Select CASES

In B. R. 22, 23, & 24. CAR. I. Regis,

REPORTED

BY

JOHN ALEYN late of *Greys Inn* Esq;

WITH

TABLES of the Names of the Cases and of the Matters therein contained:

ALSO

Of the Names of the Learned Councel who Argued the same.

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THE

THE

Names of the Learned Councel that Argued the matter in Law contained in this BOOK.

HALES.

TWISDEN.

WINDHAM.

MAYNARD.

MONTAGUE.

LATCH.

BOREMAN.

YARD.

GREEN.

Mich. 22 Car. Banco Regis.

Ann Baſeild *Adminiſtratrix verſus* Collard. 22 Car. *Rot.* 673.

IN an Action upon the Caſe the Plaintiff declares, That upon communication of a Marriage to be had between the Inteſtate's Daughter and the Defendant's Son, it was agreed, That the Inteſtate ſhould give the Son 50 li. with his Daughter, and that if the Daughter ſurvived the Son, the Defendant ſhould pay her 100 li. after his death, and mutual promiſes were made between the Inteſtate and Defendant to perform the Agreement, and ſhews that the Marriage was had, and that the Inteſtate paid the 50 li. and died, and that the Son died, and aſſigns breach in the Defendant's non-payment in retardat' adminiſtrat' &c. and upon non aſſumpſit it was found for the Plaintiff: And Maynard moved that the action ought to have been brought by the Daughter, for it has been adjudged that it lieth for her upon ſuch a promiſe, and ſo the Defendant ſhould otherwiſe be doubly charged; but upon good debate, judgment was given for the Plaintiff, for the conſideration moved from the Inteſtate, and the promiſe was made to him, yet it was agreed that it might be brought by the Daughter; 27 H. 8. 24. Tatam's Caſe Where upon promiſe to the Wife that if the Husband would releaſe Tatam out of execution, the Defendant would pay the debt; the Husband alone brought the action, and layed the promiſe made to himſelf, and recovered.

Aſſumpſit for mutual promiſe to pay A. 100 li. A. may have the Action, ſo may the Party or his Adminiſtrator.

2 Lord 212

Husband brings the Action in his own name upon promiſe to the Wife and lays the promiſe made to himſelf.

And the Court, in retardat' adminiſtrat' was good enough, though the money was to be paid to the Daughter, becauſe it was a duty to the Inteſtate, and the damages recovered will be aſſets, however it was but form, and well enough; and Roll ſaid that the very point in the principal Caſe was adjudged Paſc. 5 Jac. Between Aſhdall and Bernard: And Bacon, cited 44 Eliz. Rippon and Norton's Caſe, where the Defendant's Son made an aſſault upon the Plaintiff and his Father, and the Father was going to a Juſtice of Peace to complain, and have a Warrant for him to bind him to the Peace; the Defendant in conſideration that he would forbear to complain, promiſed the

Promiſe to the Father that, &c. the Son brings the Action. } yel. 1 1. Co. 88.

Plaintiff that his Son should not assault him any more, and upon forbearance and a new Assault the Plaintiff wrought his Action, and recovered; for the consideration moved from the Son, who should have been secured from Assaults, if the Complainant had proceeded; and it was resolved here that there needed no notice of the death of the Son.

Hardr: 42.

Etheringham *versus* Etheringham.

A Will torn in pieces with Rats, if a Stranger by laying the pieces together could make the devise appear, good: if gnawn before the death, against the Will.

IN an Ejectt' firm' upon a tryal at the Bar the Evidence was that one Warner by his Will in writing devised the Lands in question to Henry Etheringham, and the Heirs males of his body, and bailed the Writing to the Scrivener to keep, and four years after died, and about a fortnight after his death this Writing was found in the Scrivener's Study, gnawn all to pieces with Rats, yet he with the help of the pieces, and of his memory and other Witnesses, caused it to be proved in the Ecclesiastical Court; and now the Court demanded of the Witnesses, whether a Stranger that knew not the Contents of the Will before, by joyning of the pieces together could tell that the devise of the Lands in question was to Etheringham, and the Heirs males of his body; for they did agree that if this clause could be made out, though by joyning of the pieces, it were a good Will, for all that. But the Witnesses said that a Stranger could not make out that clause. Whereupon the Court directed the Jury, that if they found that the Will was gnawn before the death of the Devisor, then 'twas for the Plaintiff; if after, for the Defendant; and the Jury found for the Defendant in favour of the Will.

Markham *versus* Adamson.

Words, I accuse you to be a Witch, &c.

IN Slander, The Defendant said to the Plaintiff, I accuse you to be a Witch; and the next day said, I desire to have you searched; the Plaintiff asked, why would you have me searched? the Defendant said, because I accuse you to be a Witch; and

and after a Verdict for the Plaintiff, judgment was given against him, because the words did not import an Accusation of any offence within the Statute. But it was agreed that if the Plaintiff had been accused of bewitching a Man or a Beast, though this were not Felony by the Statute, the Action would have lain, and so hath it been adjudged.

Newman *versus* Zachary.

Action sur le Case for his false practice creating trouble, &c. to the Plaintiff.

ACtion sur le Case The Plaintiff declares that the Defendant was his Shepherd, and that two of his Sheep did estray, one of which being found again, the Defendant affirmed to be the Plaintiff's, whereupon the Plaintiff paid for the feeding of it, and caused it to be shorn and marked with his own Mark; and yet afterwards the Defendant malitiose machinans to disgrace the Plaintiff, and knowing the said Sheep to be the Plaintiffs, falsò & fraudulenter affirmavit to the Bailiff of the Manor that had waifs and strays belonging to it, that this Sheep was an Estray: whereupon the Bailiff seised it to his damage, &c. And after a Verdict for the Plaintiff Latch moved that there was no cause of Action, for there is no breach of trust in the Defendant as Shepherd, and his words cannot endamage the Plaintiff, for he shall have his remedy against the Bailiff of the Manor that seised the Sheep wrongfully. But it was adjudged that the Action would lie, because the Defendant by his false practice hath created a trouble, disgrace and damage to the Plaintiff; and though the Plaintiff have cause of Action against the Bailiff, yet this will not take off his Action against the Defendant in respect of the trouble and charge that he must undergoe in the recovery against the Bailiff, and Hales said that if one slander my Title, whereby I am wrongfully disturbed in my Possession, though I have remedy against the Trespasser, I shall have an Action against him that caused the disturbance.

Upon slandering a Title though the party hath remedy vers. Trespasser, yet Action lies against him that caused the disturbance.

Sir Thomas Bowe's Case.

If Leſſee for years hold over and pay his Rent quarterly, that makes a Tenant at will. 21 H. 7. 38 E. 14 H. 8. 11. f. Dyer 62 a. 173.

IN Debt for Rent upon a Leaſe at Will of Houſes in London, upon a Trial at the Bar touching the Title of Sir T. Bowes, it was agreed and given in charge to the Jury by Roll, that if Tenant for years holds over his term, and continue to pay his Rent quarterly as before, that this payment and acceptance of the Rent amounts to a Leaſe at Will.

Ten. at will begins a new Quarter over ſhall pay the Rent Inſt. 56. 69. 13 H. 8. 16. a. Kel. 65. 6.

2. That if Tenant at Will rendring Rent quarterly begins a new Quarter, and voluntarily determines the Will before the Quarter ended, yet he ſhall pay the Rent for that Quarter.

Evely *verſus* Livermore H. 17 Car. *Rot.* 1409.

Stat. 3 Jac. that does not extend to a ſpecial Action upon his promiſe and to give a Ticket of his charges.

IN an Aſſumpſit the Plaintiff declares that the Defendant reteined him as his Attorney to follow his Cauſes in the King's Bench, Chancery, and Court of Requeſt, and gave him ſo much in hand to defray his charges, and promiſed to pay him what more he ſhould lay out, and alledges that he layed out 10 li. more then he received for Fees of Counſel and other charges in the Defendants Suits, which the Defendant hath not paid, &c. The Defendant pleads the Statute 3 Jac. 7. that the Plaintiff did not give a Ticket to him of his charges, &c. and after demurrer it was adjudged for the Plaintiff, for the Statute doth not extend to a ſpecial Action upon a promiſe, and ſo it was adjudged in Dobbins his Caſe.

Farrer *verſus* Bates P. 22 Car. *Rot.*

Arbitrement, Debt and other Controverſies lie in Arbitrement though Debt ſolely does not.

IN an Indebitatus Aſſumpſit for 9 li. upon an Inſimul computaverunt, the Defendant pleaded a ſubmiſſion of all actions and controverſies to Arbitrement, and that the Arbitrators awarded

awarded that the Defendant should pay the Plaintiff 4 li. in satisfaction of all Accounts, and upon issue quod non se submiserunt Arbitrio, it was found for the Defendant, and upon motion in arrest of Judgment it was agreed, that though Debt it self doth not lie in Arbitrament, yet that and other Controversies doth. 10 H. 7. 4. & 4 H. 6. 27. But it was likewise agreed that where Arbitrament is no plea in Debt, it is no plea in an Assumpsit upon the Debt.

Where Arbitrement is no plea in Debt, it is no plea in an Assumpsit upon the Debt.

2. It was resolved that the Arbitrament did not reach the thing demanded, for that was only of all Accounts, and this is a duty upon the Account, and so the Defendant could have no Judgment: then it was moved to have a Repleader, but denied by Roll being then sole present.

Where it does not reach the thing demanded.

Repleader denied.

Hil. 22 Car. Banco Regis.

Powel *versus* Waterhouse. T. 22 Car. *Rot.*

IN an Assumpsit the Plaintiff declares that the Defendant in consideration of a Marriage, &c. Inter al' promisit de payer tant, & puis Verdict pro Querent' Judgment fuit done vers. luy, because he ought to set forth the whole promise which is entire.

Promise inter alia not good, ought to set forth the whole Promise.

Hinacre *versus* Lemon. M. 22 Car. *Rot.*

SLander. The Defendant said of the Plaintiff she caused Mr. Langly's Servant to steal and purloin 30 and received them and sold them, which was the cause why his Master broke, and upon a Verdict and Judgment in the Common Bench, in a Writ of Error the Judgment was affirmed; because she is charged with procuring of Felony, and receiving stollen Goods.

Words charged with procuring Felony, good.

Haines *versus* Finch.

Debt upon a promiſe for bringing up Children, good, without ſaying they were the Plaintiff's.

Debt upon a promiſe of money to marry a poor Virgin.

Servant retain'd an Attorney for his Maſter, and promiſes him his Fees: Debt lies againſt the Servant.

AN Executor brought an Action of Debt upon a promiſe made with the Teſtator, for bringing up of Children, and Teaching; and after a Verdict for the Plaintiff upon nil debet pleaded, it was moved that Debt would not lie in the Caſe, becauſe it was not layed that they were the Plaintiff's Children. But the opinion of the Court was for the Plaintiff, for Debt will lie upon a promiſe made by a ſtranger, as in N. B. 122. k. If one promiſeth money to another for marrying a poor Virgin, Debt lieth; but the parties agreed, and ſo no Judgment was given: And Roll ſaid that in Trevilian's Caſe, where a Servant retained an Attorney for his Maſter, and promiſed he ſhould have his Fees, an Action of Debt was brought thereupon by the Attorney againſt the Servant in C. B. and the Plaintiff recovered: but upon Error in this Court a rule was given for the reverſal of the Judgment, notwithſtanding the like Preſident ſhewn in Bradford's Caſe: but he ſaid that the Judgment was not reverſed upon the Roll, and his opinion was that the Judgment was good.

Edwards *verſus* French. T. 22 Car. *Rot.* 675.

Slander, whereby he loſt his Marriage: And no agreement of Marriage or mutual Love alledged, and the words were ſpoken only in the innuendo, yet good.

SLander. The Plaintiff declares that whereas there was a Communication of Marriage between the Plaintiff and one Mary Hicks, who was worth 300 li. and that ſhe deferred Marriage with the Plaintiff, q. d. that veriſimile fuit, that they ſhould be Married: the Defendant in the hearing of divers perſons ſaid Mary Hicks is Mr. Edwards his Whore, innuendo the Plaintiff; whereupon Mary Hicks was refuſed to Marry the Plaintiff: And after a Verdict for the Plaintiff it was moved, that there was no agreement of Marriage, nor mutual love alledged between the Plaintiff and M. H. 2. That the words were not alledged to be ſpoken of the Plaintiff but only in the innuendo: yet upon good debate Judgment was given for the Plaintiff.

repoſit 32

Osborne

Osborne *versus* Brooke, Trin. 22 Car. *Rot.* 677.

SLander. Captain Osborne is forsworn, and his Oath appears upon Record. The Defendant as to the first words pleads not guilty; and as to the latter, justifies that he was forsworn in finding of an indictment of Forcible Entry, and upon de injuria sua propria, as to the justification both issues were found for the Plaintiff: And upon motion of Latch in arrest of judgment. First, if the Words themselves were actionable. Secondly, if the Justification made them good and actionable; and upon great debate, judgment was given for the Plaintiff in both points. First, the Court did take the words, being spoken together, to be the same as if he had said, he is forsworn upon Record, which is as much as to call him perjured. Secondly, his justification hath explained his meaning in them to be of perjury: And Tuke and Condie's Case was cited for this, where the Defendant in an Action brought for saying, You are forsworn, justified that he was forsworn in an indictment of Battery; and the issue upon the justification being found for the Plaintiff, he had judgment in Common Bank, which was afterwards affirmed in this Court, and now allowed for good Law by both the Judges; yet two Objections were made by Latch against this judgment. First, that the Declaration of it self being insufficient in substance could not be made good by the Defendant's bar. Secondly, that the ground of the Action is the disgrace that the Plaintiff incurs before the Auditors; now they must understand the words according to the common acceptation as they were spoken, and not in the sense wherein the Defendant justifies the speaking of them, and he cited a Case 21 Jac. between Wheeler and Abbot, where in Slander for saying, Thou hast stollen my Piece, innuend' a Gun, the Defendant justified that the Plaintiff did steal his Gun, and though the Justification which shewed the Defendant's meaning to be of a Gun, was found against him, and Piece was a word of an incertain signification, which could not be explained by the Innuendo, Judgment was given against the Plaintiff for the Reasons aforesaid.

Slander. Is forsworn, and his Oath appears upon Record. Act' gist.

Justification, explains the Parties meaning to be of perjury.

2 Rolls Rep: 342

Pasc. 23 Car. Banco Regis.

Water's Case.

Ten. in common makes a Wall against the house, to prevent the others getting in, no disseisin.

IN an Assise of a House in Westminster, upon null' tort, &c. pleaded, and a tryal at the Bar, the Evidence was, that there were two Tenants in common of the House, and one of them nailed up the Doors, and made up a Wall against the House to prevent the others getting into the House, and this was resolved no Disseisin, and so the Jury were discharged. But the point in Law would have been that a Tradesman purchased Lands in fee to himself and his Wife, and after became Bankrupt, &c. whether the Commissioners had power to sell so as to bar the Wife.

Taylor *versus* Usherwood. Hill. 18 Car. *Rot.* 87.

Demise.

IN an eject' firmæ upon a special Verdict the Case was, That one devised Land to one Elizabeth for her life; and after her death to the eldest Heir male of her body, and to the Heirs males of such Heir male, so that he be of twenty four years of age at the time of the death of Elizabeth, and if he be not of twenty four years of age at that time, then that the Husband of Elizabeth shall hold them till he comes to that age, and the profits to be disposed among the younger Children; Elizabeth dieth, her Heir male within the age of twenty four years, and after he attained to that age, and entred, and demised to the Defendant. And Hales argued for the Defendant, That if the demise had rested in the Words (so that he be of twenty four years of age at the time of the death of Elizabeth) it would have been a contingent limitation upon the being of that age at that time, but now that by a mean disposal of the Profits he fills up that space of time, it appears he did not mean to make that limitation a contingency to the Remainder, but upon that supposal to provide for the younger Children; and the Case was adjourned.

Where words make a contingency by the intent of the party.

Pasc.

Pasc. 23 Car. Banco Regis.

Needler *versus* Guest. Trin. 17 Car. *Rot.* 1324.

IN an Action of Covenant, The Plaintiff declares that the Defendant being an Attorney covenanted to take the Plaintiff for his Clerk, and to allow him 2 s. for every Quire of Paper that he should Copy out, and 1 d. for every Sheet that he should engross, and so much for such and such things, and all usual fees, and among other breaches he alledged, that he copied out a Bill containing four Quires and three Sheets, for which 8 s. 3 d. was due to him, which the Defendant hath not paid. And upon a Verdict and Judgment for the Plaintiff in C. B. it was moved for error that there could be no apportionment in this Case, for the Covenant was to allow him 2 s. for copying a Quire, but not pro rata. And for this cause upon good debate the Judgment was reversed; but it was holden that if he had averred 3 d. to be the usual fee for copying three Sheets of Paper, he might have helped himself upon that Clause.

Covenant for 2 s. for copying every Quire of Paper. Breach that he copied four Quire and three Sheets, for which 8 s. 3 d. was due. And that there could be no apportionment, for the Covenant was to allow him 2 s. a Quire, but not pro rata. If he had averred 3 d. to be the usual fees for copying three Sheets he might have helped himself.

1 Sid. 226
3 Mod R 153

Vincent *versus* Furfy. Hil. 22 *Rot.*

IN an Action of Trespass for entring into his House, and breaking duas Cistas, and for taking diversa genera apparatuum in Cista prædicta existent. and for beating his Servant per quod Servitium amisit; after a Verdict for the Plaintiff, upon motion in arrest of judgment it was agreed. First, that one may have a general Action of Trespass, and a special Action upon the Case in one Action. Secondly, that the words diversa genera apparatuum were too incertain of themselves, but being referred to a Chest wherein they lay, they were reduced to sufficient certainty; but because two Chests were mentioned before, and the Apparel was alledged to be in Cista prædicta in the singular number, so that it appears not in which they were, judgment was given against the Plaintiff.

Trespass.

1 Lutw. 101 1 Lord. 223 36
1 Salk. 10 1 Sid 244

2 Salk. 643
1 Lord. 53 114
2 Lord. 262
5 Co. 34
1 Bro. 6737
5 Mod R. 181 324

Stoughton *versus* Day. Hil. 22 Car. *Rot.* 486.

Debt.

IN Debt upon a Bond with Condition, That whereas the Plaintiff is Sheriff of Surry, and hath made Cornelius Trapp his Bailiff of the Hundred of Brixto, if he should execute his Office, &c. and make true returns of all Warrants directed to him, then, &c. The Defendant upon Oyer pleads particularly performance to all; the Plaintiff replies, that process was directed to him to levy Fines upon J. S. and that he made his Warrant to Trapp to execute the same, which Warrant he did not return: and upon a Demurrer Judgment was given against the Plaintiff, because he did not shew that the Fines were to be levied within the Hundred of Brixto; for it was resolved, that though the words of the Condition were general to make return of all Warrants directed to him, yet it was to be understood of such only as were to be executed within the Hundred of which he was made Bailiff.

2 Sand: 414.
4 Mod: R. 69

Capel *versus* Allen. Hil. 22 Car. *Rot.* 639.

Debt.

IN Debt upon a Bond with Condition to perform an Award, the Plaintiff upon nullum arbitrium pleaded by the Defendant, sets forth that the Arbitrators did award de & supra præmissis modo & forma sequenti, viz. That the Defendant should pay so much to the Plaintiff, and the Plaintiff should pay for the Writings of the Award: and it was adjudged a void Award, because but of one side, for it did not appear that the other party was bound to pay for the Writings, which was the only recompence for the Defendant. And this also is matter subsequent to the submission, and so cannot be intended a good recompence.

Hardr: 45

Johnson *versus* Barret, &c. auters.

Trespas.

IN an Action of Trespass for carrying away Soil and Timber, &c. Upon Trial at the Bar the Question arose upon a Key that was erected in Yarmouth, and destroyed by the Bailiffs and Burgesses of the Town; and Roll said, that if it were erected between the high Water-mark and low Water-mark then it

it belonged to him that had the Land adjoyning. But Hale did earnestly affirm the contrary; viz. that it belonged to the King of common right. But it was clearly agreed, that if it were erected beneath the low Water-mark, then it belonged to the King. It was likewise agreed, that an Intruder upon the King's possession might have an Action of Trespass against a Stranger; but he could not make a Lease, whereupon the Lessee might maintain an Ejectione firmæ.

Whitacre *versus* Hillidell. H. 22 Car. *Rot.* 1318.

Slander. Margaret Whitacre is a Thief and stole my Tallow, and I will have her put in Bridewell; and upon motion in an arrest of Judgment after Verdict, it was agreed by Bacon and Roll that those words, she is a Thief and stole my Tallow, of themselves were actionable, and Cases cited accordingly. But Bacon held that the latter words qualified the former, for the Statute 43 Eliz. cap. 7. enacteth that persons that steal Tallow growing, which is not Felony, shall be whipped if they make not satisfaction: now Bridewell is known to be a place where such penalties are inflicted, so that upon all the words it shall be intended an accusation of such an offence, the penalty whereof is whipping, and not of Felony. But Roll contra toris viribus, because the words, she is a Thief, are single and the other accumulative, being brought in by the word And: but if it had been for the stole, &c. then they are explanatory. And this difference hath been always taken in this course. But Bacon denied the difference, and cited Clerke and Gilbert's Case, Hob. 331. thou art a Thief, and hast stollen twenty load of my Furzis, and adjudged not actionable, and no difference allowed between and and for, but Roll flatly denied that Case to be Law. 2. To accuse one of petit Larceny will bear action, and for that the offendor shall be whipped; so that might be his meaning; and he said that where the first words are a plain and direct Slander, the subsequent words that should take of their effect, ought to carry in them a very strong Intendment that they were spoken in a sense not actionable; for it is very unreasonable that one should slander another in general words, and then mitigate them by other words of a doubtfull interpretation, & sic pendet, &c.

Slander. 6 Mod: R: 23 Poph: 211

v. post 31

2 Roll. 266

Sir John Chichester's Case.

Indictment.

SIR J. C. was indicted of Manslaughter, and tried at the Bar, and evidence was that he and his Man were playing at Foils, and the Chape of Sir John's Scabbard fell off unknown to him upon a thrust, so that the Rapier went into his man's Belly, and killed him. And the Court directed the Jury, that forasmuch as such acts are not warranted by Law, the parties that use them ought at their own peril to prevent the mischief that may ensue, for consent will not change the Case; and therefore though there were no intention of doing mischief, yet the thrust being voluntary, was an assault in Law, and death ensuing, the offence was Manslaughter; yet the Jury found it Chance-medly, but the Court would not accept the Verdict, but charged them if they varied from the Indictment to find it specially. And Bacon said he had known a Jury bound over to the Star-chamber upon the like Cause, whereupon they found him guilty, and day was given him to procure his Pardon, &c.

Pasch. 23 Car. Banco Regis.

Andrews & Harborn. Mich. 22 Car. *Rot.* 483.

Scire facias.

SCire facias was brought in Middlesex upon a Recognizance taken before Justice Reeve at his Chamber at Serjeants Inn in London, and Judgment given in C. B. and upon a Writ of Error brought in this Court, it was moved, that it ought to have been brought in London where the Recognizance was taken; for though the Scire facias must be grounded upon a Record, and the Recognizance be no Record till it be entred, yet after it is entred, it becomes a Record by relation from the time of the Recognizance. And Hall and Winkfield's Case, Hob. 195. was cited, and the case was much debated: and Roll (Bacon absent) said that the most ancient and proper course was to bring the Scire facias where the Recognizance was taken; but he shewed in his hand a Certificate of all the Prothonotaries of the C. B. that of latter times they have allowed it the one way or the other; and so the Judgment was affirmed. And Pasch. 20 Jac. Rot. 210. B. R. between Polting and Fairebank the like Judgment was given

2 Luw 1207
6 Mod: R: 132 304
2 Salk: 600 2 Syd: 91
Hob: 195 210 222 Mo: 683
1 Brownl. R: 69 2 Roll. Rep: 302

given upon a Recognizance taken before one of the Judges of this Court in London, and a Scire facias brought in Middlesex; but it was said that the usual Entry in this Court is to express before what Judge it was taken, but no place where; and then it might be brought in Middlesex without question.

Hilton and Plater. Hil. 21 Car. *Rot.* 30.

SLander. The Plaintiff declares, That whereas he was At- Slander.
torney, &c. the Defendant said to him, You are a Knave, you were Attorney for my Mother, and set my Mother against my Husband, and made him spend an 100 li. and such Knaves as you have made my Husband spend all his Estate. And after a Verdict for the Plaintiff, it was moved the last Term in arrest of Judgment, because no communication is laid of his Profession, whereby the word Knave may be applied to that, and the other words do not import any scandal of him in his Profession; for he might lawfully set the Defendants Mother against her Husband, as if there were cause of Action against him; whereupon Judgment was stayed. And now this Term it was moved again; And Bacon was of opinion against the Plaintiff for the reasons aforesaid: But Roll, contra, because the subsequent words declare, that the word Knave was intended of him in his Profession, and therefore need no colloquium of his Profession. And afterwards the same Term ex assensu Baron' (mutata opinione) Judgment was given for the Plaintiff.

Trin. 23 Car. Banco Regis.

Paine *versus* Sheltroppe. Hil. 22 Car. *Rot.* 740.

IN an Action of Debt upon a Bond with Condition, That if Debt.
the Defendant and his Wife should appear such a day at the Palace Court, &c. The Defendant upon Oyer of the Condition, pleads that he himself did appear at the day prout apparet per record'; and that he was not married at the time of the Obligation, nor ever after: And it was adjudged to be no good plea, because he is estopped to deny that he had a Wife. Otherwise when the Condition is general; as to enfeoffe one of all

his Lands in Dale; there he may say he had no Lands there. Vide Dyer 50. f. 196. d. 18 E. 4. 4. f. 21 E. 4. 54. g. l. 2. 33. h.

Dominus Rex *versus* Holland.

AN Office was found and returned in the Chancery, That a Copyhold in Islington was 14 Car. granted to one John Holland and his heirs at the will of the Lord, &c. in trust for one Margaret Taylor (who was an Alien) and her heirs; and that the profits were disposed according to the trust, and that after M. T. died: and this was by virtue of a Commission to enquire what Lands, &c. M. T. had, and the Commissioners seised the Land; whereupon Holland came and shewed his Title, and traversed the seisin in trust for M. T. And Issue being joyned, it was found for the King; and note the Venire facias was awarded in the Chancery retornable in this Court, and the Record sent hither, (for they try no Issue there.) And exception was taken to the Writ because it was quorum quilibet habet 4. libratas terræ, and according to Stat. 27 El. cap. 6. which extends only to this Court C. B. Exchequer and Justices of Assise: to which it was answered, That forasmuch as it is returnable in this Court, it is well enough within the Statute; but that Answer was not allowed: but because this Clause was added by the Statute of 35 H. 8. cap. 7. which was in the affirmative, that the Writ should continue quorum quilibet habet 2. libratas terræ. And the Statute 27 El. adds that it shall be 4. libratas in such Courts, but no negative words in either Statute; therefore it is but abundans cautela, and makes not the Writ vicious. And Roll said that it was so adjudged Mich. 21 Jac. between Philpot and Feilder. The Questions in Law were, 1. If the King should have the trust: 2. If by virtue of that he might seise the Land: 3. If the Case differ'd, because Copyhold. And it was argued the last Term by Mountague for Holland, and Hale for the King; and this Term by Maynard for Holland, and Twisden for the King.

1 Syd. 436 Latch. 3

2 Roll. Rep. 331 395 2 Bro. 672

1. That Uses at the Common Law were things partly in action, so that they were not given to the King by general words of hereditaments in Statutes, as is agreed in the Marquess of Winchester's Case. And they consisted in privity, and therefore could not be transferred by act in Law, as by escheat for Attainder, &c. And the preamble of the Statute of 27 H. 8. which

which reduces the poſſeſſion to the Uſe, recites that by conveyances to Uſe, the King loſt his eſcheats and purchaſes of Aliens, &c. l. 1. 124. a.

Now Truſts being of the ſame nature at this day, they are ruled according as Uſes were at the Common Law; and therefore if a Woman conveys a term in Truſt for her ſelf, and takes Husband and dies, he ſhall not have the Truſt by ſurvivorſhip, but the Adminiſtrators of the Wife ſhould have it. 4. Inſt. 87. a. Witham's Caſe. (But Roll ſaid that it hath been ſince reſolved that the Husband ſhall have it in that caſe.) And Mainard ſaid that the Alien himſelf had no remedy in equity for the Uſe at Common Law, nor for a Truſt at this day; for he could not compell the Feoffees to execute it.

2. If the King ſhould have the Truſt yet he cannot ſeiſe the Land by Law, for the Alien himſelf had not that power; his remedy, if he ſhould have any, was only in the Chancery.

3. The Land it ſelf being Copyhold, the King cannot have it. 1. Becauſe it is not transferrable by act in Law without the concurrence of the Lord, for the prejudice that may accrue to him in loſing his Fine, &c. 2. Becauſe the King cannot perform the ſervices incident to the Tenure; and yet in default thereof, the L. could not take advantage of the forfeiture as againſt the King.

3. It would be an injury to ſtrangers that ſhould have right to the Copyhold; for the King is not to be impleaded in the Lords Court where only remedy is to be taken.

4. The Eſtate is too baſe for the King to hold.

On the contrary it was ſaid,

1. That the King ſhould have had a Uſe limited to an Alien at the Common Law, and by the ſame reaſon that he was to have the Land purchaſed by Aliens, viz. That the Realm ſhould not be impoveriſhed by ſtrangers; and Uſes at the Common Law were not properly things in action, but Inheritances deſcendible by the rules of the Common Law, and would have paſſed by grant or deviſe by the name of Hereditaments, as Hale ſaid. And he ſaid that the preamble of the Statute of 27 H. 8. is not to be intended as though the King ſhould not have remedy for the profits when the Uſe was diſcovered, but that the Lands were ſo craftily conveyed that the Uſe could not be diſcovered. Now the caſe is the ſame of a Truſt.

1 Jyd. 260

2. The King be virtue of this Truſt may ſeiſe the Land; for though the profits only are given him by the Truſt, yet he hath not any direct means to be ſatisfied of thoſe profits unleſs he may ſeiſe the Land. And therefore 5 H. 5. 3. where a Manor with an advowſon appendant was granted to the uſe of one who was after outlawed, and upon an avoidance the King brought a Quare impedit, and had a Writ to the Biſhop. And Hales ſaid that 19 Jac. in Sir John Dacke's Caſe, in Scaccar' to whom the King granted a term to the uſe of the Lord, who was attainted of Felony: upon great deliberation with all the Judges it was reſolved, and accordingly decréed, that the Truſt ſhould be forfeited to the King, and the intereſt of Sir John alſo.

3. Now that the Eſtate of the Copyholder is fixed by the Cuſtome, there is the ſame reaſon for that as for any other Inheritance. And this Term the Court took an exception to the Commiſſion, which was only to enquire what Lands, &c. the Alien had, but no Capias in manus in it; and therefore it was reſolved that the ſeiſure was unduly made, and therefore they did not openly declare their opinion upon the matter in Law. But Bacon ſaid that an Alien at the Common Law could not compell the Feoffees to execute an Uſe: And Roll ſaid, that though the King ſhould have the Uſe, yet he could not ſeiſe the Land it ſelf by Law, but by equity he might have a Decrée for the Land: and ſo was Sir John Dack's Caſe. And the Court doubted what Judgment ſhould be given, the Verdict being found for the King. And the rule was, that ceſſet intratio judicii, &c. for they held that they could not give any Judgment, but afterward Termino Paſchæ 24 Car. the opinion of the Court being changed, they directed the Caſe ſhould be argued. And Hale argued for the King, that no Judgment could be given againſt him, becauſe the Record of the Inquiſition is ſtill remaining in the Chancery: and this Court hath no power to proceed, but only to trial of the Iſſue, and upon the Verdict, for the very Record as to that is in this Court (and yet he ſaid that the Record after the Trial hath bén remanded into the Chancery, and Judgment given there) but the tenour only of the Inquiſition is here, as appears by the Entry, &c. but if it had bén brought in per manus proprias of the Képer of the Great Seal, then the whole Record had bén here, and ſo Judgment ſhould have bén given upon the whole Record. And he took this difference, that when the tenour of a Record being removed, the Court where the Original Record reſides cannot proceed, then the Court where the tenour is may proceed upon the

the tenour. And therefore if the tenour of a Fine be certified upon a Certiorari out of the Tower or Treasury into the Chancery, and sent into the Common Pleas by Mittimus, Execution may be awarded there upon the tenour 39 H. 6. 4. a. So if the tenour of a Judgment in a Writ of Annuity be certified out of the rescripte in the Common Pleas into the Chancery, and sent thither by Mittimus they may award execution there upon the tenour 34 H. 6. 2. d. because in those cases there are no other Justices that can proceed upon the Record it self, but where the Judges where the very Record resides may proceed thereupon, notwithstanding any tenour certified in such cases, there can be no proceeding upon the tenour: As if the tenour of a Judgment in ancient demesn be certified in Chancery, and sent by Mittimus into the Common Pleas, no Scire facias lieth thereupon; because the Court of Ancient Demesn may still proceed to execution upon the Record it self. 39 H. 6. 3. h. &c. So in our case the Chancery may still proceed to seisure upon the Inquisition, affirming it to be good. 14 E. 4. 7. a. And therefore this Court cannot proceed upon the tenour of it, for thence might ensue a clashing of the Courts; the one affirming it, and the other quashing it: and for these reasons he prayed that the former rule might stand. But it was answered by Maynard, and resolved by the Court, that Judgment ought to be given against the King, because the whole Record is virtually here, otherwise they should be bound up to the Verdict, so that Judgment should be given according to that, though it appear upon the whole Record that the King had no Title. And both the Judges denied that the Chancery could proceed upon the Inquisition, now that the same was sent hither upon the Traverse, but that the Judgment in this Court would utterly subvert the Inquisition: And therefore Judgment was given quod manus Domini Regis amoveantur.

1 Jo. 436
2 Hob. 3

Shalmer *versus* Slingsby. Hil. 22 Car. *Rot.* 1036.

IN an Action of Debt upon a Bond the Defendant pleaded, That the Bond was made in another County than where it is alledged in the Declaration; and prayed that the Attorney might be examined thereupon by force of the Statute of 6 R. 2. cap. 2. And the Plaintiff demurred, as if it had been a plea in bar to the Action: And the Defendant joyned in demurrer, and concluded quod ab actione præcludatur. And it was resolved that the plea was naught, and not warranted by the Sta-

Debt.

tute, which provides only that the Original shall not be laid in one County; and the Declaration upon a Bond made in another County: and if so, the Writ shall abate; but this course of pleading hath been alwaies disallowed. Vide 3 H. 6. 35.

2. Because the demurrer was joined as to the Action, therefore Judgment was given quod recuperet, &c.

Wright *versus* Paul Pindar. Pasc. 22 Car. *Rot.* 440.

Trover.

IN a Trover and Conversion brought by an Administrator; upon not guilty pleaded, the Defendant upon the evidence confesses, that he did convert them to his own use; but further saith, that the Intestate was indebted to the King, and that 18. May, 14 Car. it was found by Inquisition, that he died possessed of the Goods in question; which being returned, a venditioni exponas was awarded to the Sheriff, who by virtue thereof sold them to the Defendant. And to prove this the Defendant shewed the Warrant of the Treasurer, and the Office-Book in the Exchequer, and the Entry of the Inquisition, and the venditioni exponas in the Clerk's Book; to which the Plaintiff saith, that the matter alledged is not sufficient to prove the Defendant not guilty; and that there was no such Writ of venditioni exponas. And the Defendant saith, that the matter is sufficient, and that there was such a Writ. And it was resolved, that he that demurs upon the Evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the Court. And if the matter of fact be uncertainly alledged, or that it be doubtfull whether it be true or no, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alledges this matter cannot join in Demurrer with him, but ought to pray the judgment of the Court, that he may not be admitted to his Demurer, unless he will confess the matter of fact to be true. And for that the Defendant did not so in this case, both parties have misbehaved themselves, and the Court cannot proceed to Judgment. But it was clearly agreed, that upon Evidence the Court for reasonable cause, at their discretion, may permit any matter to be shewn to prove a Record. Com. 411. b. And the opinion of the Court was, that an alias Venire facias should be awarded, and not a Venire de novo, because no Verdict was given.

Dodd ci. 2 Rolfath. in. fin. v. Ca. Hardr. 20

Trin.

Trin. 22 Car. Banco Regis.

King *verſus* Somerland. Paſc. 23 Car. *Rot.* 140.

IN an Action of Debt for Rent, the Plaintiff declares upon a Lease for years made by a ſtranger, who bargained and ſold the Reverſion to the Plaintiff per indenturam debito modo irrotulat' in curia Cancellariæ; and after a Verdict for the Plaintiff, upon nil debet, pleaded, it was moved in arreſt of Judgment, that he had not alledged the inrolment to be within ſix months, nor ſecundum formam Statuti: And though it were ſaid to be debito modo, that would not help, becauſe it might be ſo at the Common Law, and the Verdict could not make the Declaration good for want of a convenient certainty for the foundation: and therefore upon great deliberation Judgment was given againſt the Plaintiff. Debt. v. 2 pres 43

Coleman *verſus* Painter. Trin. 23 Car. *Rot.*

IN an Action of Debt upon a Bond with condition to perform Covenants, one of which was, that the Plaintiff ſhould not be interrupted in his poſſeſſion of certain Lands by any perſon that had lawfull Title; and particularly, that he ſhould not be interrupted by one Thomas Anthony, by virtue of any ſuch Title; upon performance of Covenants pleaded, the Plaintiff replies, that 1. Novemb. 20 Car. the Defendant made a Leaſe for years to the Plaintiff of the Lands mentioned in the Deed, and that the 3. of the ſame month the Plaintiff entred, and that before this time, viz. 17. Auguſti 20 Car. the Defendant made a Leaſe to the ſaid Tho. Anthony for a term of years yet to come, who 20. Aug. 20 Car. entred into the Land, &c. the Defendant pleaded, that the ſaid Leaſe made to T. A. was with condition of reentry for non-payment of Rent, and that before the Leaſe made to the Plaintiff the Rent was behind, & legitime demandat ſecundum formam indenturæ; And upon non-payment he reentred and made a Leaſe to the Plaintiff: And upon a general demurrer it was reſolved, that the Demand was inſufficiently alledged; for he ought to ſet forth certainly when and where it was made, that it might appear to the Court to be legal; but for the flaw in the Plaintiff's replication, becauſe he alledged Debt.

his Entry after the Leaſe made to T. A. ſo that it doth not appear that he was interrupted by him: the opinion of the Court was againſt the Plaintiff, but the next Term, by leave of the Court, he diſcontinued his Action.

Brown *verſus* Evering. Hil. 21 Car. *Rot.* 354.

Debt. IN an Action of Debt for Rent, after a Verdict and Judgment for the Plaintiff in the Common Pleas, upon a Writ of Error brought, and Diminution alledged, it appeared, that the Iſſue was joyned Paſc. 21 Car. And the Venire facias certified to be in placito prædicto inter partes prædictas hoc teſte, Paſc. 20 Car. And this was moved for Error; but it was adjudged to be holpen by the Statute of 8 El. cap. 14. as if there had been no ſuch Writ, for it is impoſſible that this ſhould be the Writ in that Action.

Long *verſus* Bennet.

Aſſumpſit. IN an Aſſumpſit the Plaintiff declares, That in conſideration that he had ſold to the Defendant unam acram ligni, he promiſed to pay him 8 li. And after Verdict for him, upon non Aſſumpſit, it was moved, that the Declaration was uncertain, becauſe it doth not appear whether the Soil it ſelf, or the Wood only were ſold: but after much debate the Plaintiff had his Judgment. Vide 17 E. 4. 1. d.

Frier *verſus* Prentice. Paſc. 23 Car. *Rot.* 416.

Aſſumpſit. IN an Aſſumpſit the Plaintiff declares, That the Defendant in conſideration that the Plaintiff would permit J. S. to enjoy certain Lands, &c. promiſed to pay to the Plaintiff 15 li. annuatim pro quolibet anno during four years, if J. S. ſhould live ſo long; and after the firſt year the Plaintiff brought his Action, and upon non Aſſumpſit had a Verdict and Judgment, though it was not averred that J. S. lived ſo long, for the Action lieth after the firſt year, Si being a limitation ſubſequent.

Shaw

Shaw *verſus* Huntly. Trin. 21 Car. *Rot.* 321.

IN Debt againſt an Executor; upon plene adminiſtravit pleaded, and Iſſue thereupon, the Jury found that the Teſtator deviſed that his Executors ſhould ſell certain Lands. Debt.

Mich. 23 Car. Banco Regis.

Blackwell *verſus* Aſhton. Hil. 22 Car. *Rot.* 636.

A Scire facias was brought againſt three Bailees upon a Recognizance acknowledged by them and the principal ſoyntly and ſeverally; and upon a demurrer the Writ abated by good adviſement, becauſe this being founded upon a Record, the Pl. ought to ſhew forth the cauſe of the variance from the Record, as that one was dead: but if an Action be brought upon Bond in the like caſe, there the Defendants ought to ſhew that it was made by them and others in full life, not named in the Writ, becauſe the Court ſhall not intend that the Bond was ſealed and delivered by all that are named in it; and therefore the Defendants cannot demur upon it though it be entred in hæc verba. And ſo it is if an action be brought upon a Recognizance taken before the Mayor and Recorder, &c. by the Statute of 23 H. 8. becauſe there the parties muſt ſeal, and ſo hath it been adjudged. Dyer 227. e. 28 H. 6. 3. c. 36 H. 6. 16. Scire facias. 1 Syd 238: 272 420 v. post 42 1 Syd 238: 272

Fyner *verſus* Jeffrys. Trin. 23 Car. *Rot.* 1599.

IN an Aſſumpſit the Plaintiff declares, That where one Richard Brand had aſſaulted and beaten the Plaintiff, &c. the Defendant in conſideration that the Plaintiff would not proſecute the ſaid R. B. &c. promiſed to pay him ſo much as the Plaintiff was damnified: and averrs, that he hath not, nor yet doth, proſecute the ſaid R. B. &c. And that he was damnified by reaſon of the ſame Battery in 30 li. which the Defendant, though ſuch a time and place required, hath not paid; and upon non Aſſumpſit, and a Verdict for the Plaintiff, it was moved, that Aſſumpſit.

the Plaintiff hath not given the Defendant notice of what he was damnified in; but yet the Plaintiff had his Judgment, because the Defendant hath taken upon him to pay the damage that the Plaintiff ſuſteined; which when the Plaintiff aſcertains to him, and requires him to pay, the Defendant at his peril is bound to pay, if in truth he were ſo much damnified.

Lodge *verſus* Weeden. Hil. 22 Car. *Rot.* 146.

IN an Action upon the Caſe for killing of Cattel infected de quodam morbo mortali Angl. the Murrain, and throwing their Entrails into the Plaintiff's Field, per quod diverſa averia of the Plaintiff's interierunt: after a Verdict for the Plaintiff, upon not guilty pleaded, it was moved to be too uncertain, becauſe it doth not appear what, nor how many Beaſts periſhed: but yet Judgment was given for the Plaintiff, becauſe there needs not ſuch certainty in an Action upon the Caſe, which is not brought for the Beaſts themſelves, or the value of them; but for damages ſuſtained by their death through the Defendants means.

Sims *verſus* Gregory and others. Trin. 23 Car. (or Paſch. 22 Car.) *Rot.* 247.

Treſpaſs. IN an Action of Treſpaſs upon the Statute of Monopolies made anno 21 Jac. the Plaintiff ſets forth the Statute, and that 13. Jul. 14 Car. proclamation was made by the King concerning Wines; by colour whereof the Defendants procured the Plaintiff to be impriſoned, and 200 Pipes of his Wine to be detained till he made Fine for them; and that afterward, viz. 15 Jul. 14 Car. another Proclamation was made, & colore hujus Proclamationis, poſtea, ſcil. 7. Jan. 20 Car. the Defendants cauſed the ſaid Plaintiff to be taken and impriſoned, and that the Defendants not fearing the ſaid Stat. poſtea ſcil. 14. Jul. ann. 20. ſupradicto tantas minas de impriſonamento corporis ipſius T. Sims adtunc & ibidem intulerunt quodidem Th. Sims per longum tempus, ſcil. à præd' 14. die Jul. anno 20. ſupradict. uſque diem impetrationis hujus billæ, ſcil. 14. diem Jul. 21 Car. circa negotia ſua neceſſaria palam intendere non audebat, &c. contra pacem, &c. & contra formam Statuti, &c. The Defendant pleaded not guilty within

within six years, and it was found for the Plaintiff. And it was moved in an arrest of Judgment that the Declaration was repugnant; for the Imprisonment is laid to be 7. Jan. 20 Car. and then follows, that the Defendants postea scil. 14. Jul. 20 Car. tantas minas, &c. which is before the Imprisonment, for the King began his Reign 27. Martii, and the Jury have given damages with relation to the whole time, whereas the Declaration is nought as to a great part of it. And the Case being much debated, it was agreed,

1. That the Plaintiff in his Declaration need not answer the order of time wherein the Trespasses were done, but may alledge that which was done 7. Jan. before that which was done 14. Jul. But yet

2. It was resolved, that postea in the latter place must refer to the time immediately precedent, and cannot leap over that, and refer to the time wherein the Proclamation was made.

3. It was resolved, that the word postea in this case could not be void, and the time brought in by the Scilicet stand absolutely, because the word Scilicet is but explanatory, and for instance, and cannot contradict any thing that is precedent, Hob. 172. But if the word Scilicet had been out, and the time brought in by it had been alledged substantively, then the word Postea would have been void, being repugnant. 2 Lutw. 1518 Hard. 4 Hob. 94 171 213 294 172

4. It was resolved, that the time brought in by the Scilicet was repugnant and void, and the Declaration stands as if no such time had been alledged: and then it runs thus. That the Defendant's Postea tantas minas, &c. intulerunt quod idem J. S. per longum tempus circa negotia sua necessaria palam intendere non audebat; and though this be uncertain, for that no time is alledged, yet it being not the substance of the Action, but only for aggravation of damages, and in as much as evidence could not be given of any threats, after the reste of the Bill, or damage by reason of them, therefore being after a Clerica, it was resolved to be good enough.

Lastly, It was resolved, That it shall not be intended in this case, that the Jury have given damages with respect to the time brought in by the last Scilicet, after per longum tempus, which over-reaches the time that the threats were made; (the time brought in by the first Scilicet being taken to be void) but that

the time mentioned in both places being in Judgment of Law taken to be void, and as out of the Declaration, it shall be taken to be out of the consideration of the Jury in taxing the damages, and for this the Case in 20 H. 6. 15. was cited by Roll; where a Trespass was laid with a continuando usque diem impetrationis brevis, viz. 14. diem Febr. anno 17. whereas the Writ bare teste 12. Octob. anno 17. which was before the day alledged for the time of the continuance. And yet the Plaintiff after a Verdict had his Judgment. And Hunt and Lawring's Case, Hob. 284. a. where in Trespass, &c. per quod servitium amisit, per longum tempus, viz. per spatium 6 mens. tunc proxim. sequent'. And the Original bore teste within the six months; and after a Verdict the Plaintiff had Judgment, for that the viz. was more then needs. And Judgment was given for the Plaintiff in the principal Case.

Tanner *versus* Lawrence. Trin. 23 Car. *Rot.*

Assumpsit.

IN an Assumpsit the Plaintiff declares, That in consideration that the Plaintiff would buy certain pieces of Cloath for the Defendant's use; the Defendant promised that he would give him 2 s. for every piece that he should so buy, and averrs that he bought 100 pieces for the Defendant's use, for which he ought to have 10 li. and alledges a special request of the said 10 li. to be paid by the Defendant according to his promise. And upon non Assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Plaintiff hath not averred that he gave notice to the Defendant how many pieces of Cloath he bought for him; to which it was answered, that this special request to pay 10 li. according to his promise, doth imply a giving notice of what he bought. But it was resolved, that notice is necessary in this case, and not supposed by this special request; for the Defendant cannot tell that so much is due as the Plaintiff requires, unless he had notice of what Cloath he bought for him. And Judgment was given against the Plaintiff.

20 Car. 432
1 Sulw. 379 456

Brooke *versus* Brooke. Trin. 23 Car. *Rot.* 580.

Debt.

IN Debt upon a Bond of 40 li. with Condition, That if the Obligor at or before the Feast of St. John Baptist next following,

lowing the date, should make an absolute estate of Inheritance to the Obligee of such Lands, then, &c. the Defendant pleads, that after the making of the Bond, at all times before, and at the said Feast of St. John Baptist, he was ready upon the Land to make such an Estate to the Plaintiff, &c. And upon Demurrer it was adjudged for the Plaintiff, because the Defendant ought to have given the Plaintiff notice that he would make him such a conveyance, to the making whereof the presence of the Plaintiff was necessary: but if the Condition had been for the making of a Feoffment, then for that a day certain was appointed, the plea had been good, for the Plaintiff at his peril ought to attend at the day. Vide Co. 5. 22. g.

5 Co: 22
1 Bro: 557
Owen 157
Mo: 454 457

Parmenter *versus* Cressey. Trin. 23 Car. *Rot.* 1034.

IN an Assumpsit the Plaintiff declares, That in consideration of twelve pieces of Stuff, of the value of 42 li. 15 s. delivered by the Plaintiff to the Def. the Def. promised to deliver to the Plaintiff so many Pipes of Sack, which the Defendant then had lying in a certain Cellar of a stranger in London, as should be of the value of the said Stuff, per præfat' querent eligend'. And the Plaintiff averrs, that at Norwich he did require the Defendant deliberare vinum prædict' præfat' querent' ad eligendum so many of the Pipes as should be of the value of the Stuff, &c. And after a Verdict for the Plaintiff, upon non Assumpsit pleaded, upon motion in arrest of Judgment it was so resolved, 1. That a special request is necessary in this case, because the Defendant cannot deliver the Wine in this case before the Plaintiff hath made his election, and there is no reason that the Defendant should require the Plaintiff himself to make his election, as he ought to doe if the promise had been to deliver them to a Stranger: Then it was objected that the request was not well made. 1. Because it was made at Norwich where the Defendant cannot deliver the Wines. 2. Because the request was to deliver the Wines, whereas the Defendant is not by his promise to deliver them till the Plaintiff shall have made his election.

Assumpsit.

6 Mod: R 259.

But it was resolved that the request was well made: for 1. The Plaintiff must make his request where he can meet with the Defendant, and thereupon the Defendant ought to appoint a reasonable time when he will be ready to goe with the Plaintiff to the Celler, that he might make his election. 2. The request

in reſpect of the manner was well, for he hath directly performed the agreement, which was to deliver them to the Plaintiff to be choſen; and therefore it is as much as if he had required him to perform his promiſe, which muſt be by ſhewing the Plaintiff the Wine in the Celler, to the intent that he might make his choice, which is not to be of the ſpecies of Sack; viz. whether Canary or Sherry, &c. for then indeed the Plaintiff ſhould have made his choice before he could have requeſted the delivery, but of the goodneſs of it. And therefore he muſt taſt the Wine (as Roll ſaid, and Bacon did not deny it) before he need make his election. And upon good debate the Plaintiff had his Judgment.

Gurman *verſus* Hill. Paſc. 23 Car. *Rot.*

Debt. IN Debt upon Bond with Condition to perform an Award of all Controverſies; Upon nullum arbitrium pleaded, the Plaintiff ſet forth an Award de & ſupra præmiſſis, that the Defendant ſhould pay ſo much to the Plaintiff in ſatisfaction of all Controverſies between them till the day of the Award made: And upon great debate made, it was adjudged a good Award; for the Court ſhall not conceive any new Controverſie ariſen between the Submiſſion and the Award, unleſs the Defendant ſhews it. And the rather, becauſe it was pleaded to be de & ſupra præmiſſis, which carries an intendment of an Award proportionable to the Submiſſion. And Browne and Goffee's Caſe, Hob. 190. was cited accordingly. Hil. 14 Jac. Rot. 593. C. B. the ſame Judgment given between Paine and Lee.

Wms Saund. 309 Hutt 9
Mo: 885 12 Jac. 524
Hob 191 1 Bronl 40

Mich. 23 Car. Banco Regis.

Paradine *verſus* Jane. Hil. 22 Car. *Rot.* 1178, & 1179.

Debt. IN Debt the Plaintiff declares upon a Leaſe for years reddendo Rent at the four uſual Feaſts; and for Rent behind for three years, ending at the Feaſt of the Annunciation, 21 Car. brings his Action: The Defendant pleads, that a certain German Prince, by name Prince Rupert, an alien born, enemy to the King and Kingdom, had invaded the Realm with an hoſtile Army of men; and with the ſame force did enter upon the Defen-

Defendant's poſſeſſion, and him expelled, and held out of poſſeſſion from the 19 of July 18 Car. till the Feaſt of the Annunciation, 21 Car. whereby he could not take the profits; whereupon the Plaintiff demurred, and the plea was reſolved inſufficient.

1. Becauſe the Defendant hath not anſwered to one quarters Rent.

2. He hath not averred that the Army were all Aliens, which ſhall not be intended, and then he hath his remedy againſt them; and Bacon cited 33 H. 6. 1. e. where the Gaoler in bar of an eſcape pleaded, that Alien enemies broke the Priſon, &c. and exception taken to it, for that he ought to ſhew of what Countrey they were, viz. Scots, &c.

3. It was reſolved, That the matter of the plea was inſufficient; for though the whole Army had been Alien enemies, yet he ought to pay his Rent. And this difference was taken, that where the Law creates a duty or charge, and the party is diſabled to perform it without any default in him, and hath no remedy over, there the Law will excuſe him. As in the caſe of Waſte, if a Houſe be deſtroyed by Tempeſt, or by Enemies, the Leſſee is excuſed. Dyer 33. a. Inſt. 53. d. 283. a. 12 H. 4. 6. ſo of an Eſcape. Co. 4. 84. b. 33 H. 6. 1. So in 9 E. 3. 16. a Superſedeas was awarded to the Juſtices, that they ſhould not proceed in a Ceſſavit upon a Ceſſer during the War, but when the party by his own contract creates a duty or charge upon himſelf, he is bound to make it good, if he may, notwithſtanding any accident by inevitable neceſſity, becauſe he might have provided againſt it by his Contract. And therefore if the Leſſee covenant to repair a Houſe, though it be burnt by Lightning, or thrown down by Enemies, yet he ought to repair it. Dyer 33. a. 40 E. 3. 6. h. Now the Rent is a duty created by the parties upon the reſervation, and had there been a Covenant to pay it, there had been no queſtion but the Leſſee muſt have made it good, notwithſtanding the interruption by enemies, for the Law would not protect him beyond his own agreement, no more then in the caſe of reparations: This Reſervation then being a Covenant in Law, and whereupon an Action of Covenant hath been maintained, (as Roll ſaid) it is all one as if there had been an actual Covenant. Another reaſon was added, that as the Leſſee is to have the advantage of caſual profits, ſo he muſt run the hazard of caſual loſſes, and not lay the whole burthen of them upon his Leſſor; and Dyer 56. 6. was cited for this purpoſe, that though the Land be ſur-

Nota.

Vide Co. 4. 82. a.

rounded, or gained by the Sea, or made barren by Wild-fire, yet the Leſſor ſhall have his whole Rent: And Judgment was given for the Plaintiff.

Wheeler *verſus* Walroone. P. vel T. 18 Car. *Rot.* 600.

By deviſe of all the reſt of his Goods, Chattels, Leaſes, Eſtates, Morgages, &c. to his Wife, paſſed but an Eſtate for life. Crooke 3. part 447, 449, 450. the reaſon.

2 Vent: 206. Poller 492 12 Mod: 764 1 Salk: 234 6 Mod: R 106 2 Vent: 206 1 Sand: 170 1 Lev: 212 3 Lev: 434 3 Mod R 228

IN an Ejectione firmæ: Upon a ſpecial Verdict, the caſe was, that one being ſeiſed of the Manor of D. and other Lands in Somerſetſhire, by his Will in writing deviſed the Manor to A. for ſix years, and part of the other Lands to B. in fee; and then comes in this clauſe, And the reſt of all my Lands in Somerſetſhire, or elſewhere, I give to my Brother, and the Heirs of his Body. And the queſtion was, whether the reverſion of the Manor paſſed or no; for it was ſaid, that the word Reſt did extend only to ſuch Lands as were not deviſed before: but it was adjudged for the Defendant, that the reverſion of the Manor paſſed by the deviſe.

Baker *verſus* Edmonds. Hil. 22 Car. *Rot.* 222.

Action ſur le Caſe.

IN an Action upon the Caſe the Plaintiff declares, That the Defendant was indebted to one Gode in the ſumm of 43 l. 1 s. for, &c. And being ſo indebted, promiſed to pay him; which Gode was indebted to the Plaintiff, and became Bankrupt; whereupon a Commiſſion upon the Statute was ſued forth, and the Commiſſioners did aſſign debita præd' Gode in quadam ſchedula continent' præd' ſummam 43 li. 1 s. to the Plaintiff, &c. the Defendant pleads, that he made no ſuch promiſe to Gode. And by ſpecial Verdict it was found, that the Defendant was indebted to Gode but in 41 li. 1 s. which he promiſed to pay; and that the Commiſſioners aſſigned debita præd' Gode mentionat' in quadam ſchedula continent' præd' ſummam 43 li. 1 s. to the Plaintiff. And if this be ſame promiſe that the Plaintiff hath declared upon, they find for the Plaintiff. And two Objections were made. 1. That it is not the ſame promiſe, becauſe the Plaintiff hath declared of a promiſe to pay 43 li. 1 s. and the Jury find the promiſe to be but of 41 li. 1 s. 2. That upon the whole Record it appears, that the Plaintiff hath not made a good Title to his Action, for he hath alledged the Aſſignment to be of a debt of 43 l. 1 s. whereas the debt was but 41 li. 1 s. And this being an entire thing

thing will not pass by the Assignment of a greater sum: But it was answered and resolved, 1. That it is the same promise; for if Gode himself had brought the Action, he should have recovered upon this Verdict, and the Assignment by the Commissioners vests the Debt in the Plaint. And he hath the same remedy to recover as the Bankrupt himself had. And the difference was taken between an Action upon the Contract it self, &c. for there if the party mistakes the sum agreed on, he fails in his Action; but if he brings his Action upon the promise in Law, which arises from the Debt, there, though he mistakes in the sum, he shall recover, and so hath it been adjudged. 2. The Assignment is not in question, for the Issue and Verdict are concluded to the promise; and so that which they find touching the Assignment is not material, however the Assignment is not laid to be of such a sum, as by that name, for then it would have been a question whether good; and the Court inclined that it would not have been good. Dyer 219. g. 21 E. 4. 22. 1. Br. Issue joyn 80.

Mich. 23 Car. Banco Regis.

But the Assignment is laid to be of the Debts of Gode, mentioned in a schedule containing that sum; and so it was found by the Jury, therefore the Court shall intend it to be in such a manner, as that the Debt of 41 li. 1 s. might well pass thereby. And after much debate Judgment was given for the Plaintiff.

Munday *versus* Baily. Trin. 23 Car. *Rot.* 83. or 82.

IN an Assumpsit upon an Indebitatus for Rent reserved upon a Lease for years: After a Verdict for the Plaintiff upon non Assumpsit, Judgment was given against him, because the Action will not lie for Rent, but he must have an Action of Debt for it. Assumpsit.

Lawrence *versus* King, and others.

IN an Ejectione firmæ upon a Lease of a House in Newington Common, Oxon. Upon not guilty, the Jury appearing at Bar, one was challenged, because he was Tenant of a Manor, to which there was a Court Leet, of which the Plaintiff was Steward. And the Court inclined, that it was no principal challenge; but for want of sufficient pone it fell so, and the Court would Ejectione firmæ

would not examine him upon a voir dire after it. Another was challenged by the Defendant, and being upon his Trial, soit treit, said the Plaintiff, but not allowed; for that must be upon the Challenge, and not upon the Trial, and therefore he was tried and sworn.

And the Case upon the Evidence was, that Tenant in Capite of certain Lands, and the House in question, conveyed all (as it was found by Office) to his youngest Son, and died, his eldest Son and Heir being within age, who attained to his full age, and died before livery sued. And the younger Son entred, and made a Lease to the Plaintiff of the whole Land; and whether this Lease was good for the whole, was the question. And the Plaintiff's Counsel offered to prove by another Office, that other Lands were left to descend to the eldest Son, which were more then a full third part of the whole Lands the Tenant had: but it was not allowed, for the Office wherein the House in question is found, is a Record by it self, and the King's Title must be taken as it is found in that, and not as it stands by comparison with another Office. 2. It was a question, whether a Lease made by the younger Son in this case before seisure (for none could be proved) were not good for the whole. And it was holden to be void as to a third part, and so it was, though the third part were not set out by the Statute; for the King's interest commences by the Office before seisure, and before setting out of the third part. 3. It was agreed, that the Land continued in the King's hands for a third part, till an ouster le maine sued, though the Heir were dead. 4. It was agreed by all, that where an ouster le maine is necessary, a Lease for years made before is not good. And Bacon said, that where the Heir of the King's Tenant in Capite dies before livery sued, that the Land is not Debtor for the Arrears (which the King ought to have from the death of the Ancestour in such case) till they are computed by an Officer in the Exchequer, and made a Debt upon Record, and then the Land is Debtor. And after much dispute a Juror was taken by consent of parties.

1 H. 7. 5. c.

Stamf. 35. c.
l. 8. 175. c.
13 H. 4. 3. 8.
h. 14. a.
1 H. 7. 5. c.
21 H. 7. 7. b.

Dueton *versus* Eaton. Hil. 22 Car. *Rot.* 925.

Action sur le Case.

IN an Action of the Case for speaking divers slanderous words of the Plaintiff, amongst which some were these words, That he had the French Pox: upon not guilty, the Jury found that he had all the

the words in the Declaration exceptis his verbis, thou haſt the French Pox,& quoad the ſpeaking of thoſe words, they find that he ſaid thou haſt had the French Pox, & ſi, &c. they find for the Plaintiff, and aſſeſs entire damages. And the opinion of the Court was clear, that the variance was material; ſo that the Declaration was not maintained by the Verdict: And both the Judges inclined that the words ſaying were not actionable, for they do imply that the Plaintiff had that diſeaſe, but was recovered: Then an exception was taken to the Verdict, becauſe the Jury did not find that the Defendant did not ſpeak the words in the Declaration. And yet this defect was not ſupplied by the words exceptis his verbis. And for this cauſe it was reſolved, that the Verdict was inſufficient, and a Venire facias de novo was awarded. Vide Dyer 75. a. 171. e. Dyer 75. a.

Yearworth *verſus* Pierce.

Slander. Thou art a Thief, and haſt ſtollen my Dung: After a Verdict for the Plaintiff it was moved, that the words were not actionable, becauſe Dung is an inconſiderable thing to ſignifie either Dung in a heap, which is a Chattel, or Dung ſpread upon the ground, which is parcel of the Freehold, and therefore falſely may be converted to it. But upon good debate Judgment was given for the Plaintiff, becauſe the firſt words being plainly actionable, the other ſhall not be taken away by ſubſequent words ambiguous; for when ſubſequent words explain the words precedent, they ought to be taken in a ſtrong intendment, that they were ſpoken in ſuch a ſenſe as were not actionable; and then alſo Roll pleas they ought to be brought in by way of explanation by the words For, as to ſay thou art a Thief, for thou haſt, &c. but if the words are, thou art a Thief, and haſt ſtoln, &c. there the latter words are ſurplusage. But Bacon denied the Diſtinction, and cites Clerk and Gilbert's Caſe, Hob. 331. where that difference is denied, and ſaid, that 8 Car. in the Common Pleas, where the words were thou art a Thief, and haſt robb'd thy Kinſman of his Land, The Court was divided in opinion; but after upon Conference with all the Juſtices at Serjeants Inn, it was adjudged for the Plaintiff. And Roll denied thoſe caſes to be Law, and ſaid, that this matter only was reſolved upon conſideration of that in Hobart, which had been often denied for Law in this Court. And he ſaid, that he had conferred with Sir Robert Barkley and Sir John Slander. vide ante 7.

Bramston, and their opinions concur with him in this point. And Roll held, that if the Defendant had said thou hast stollen my Dung, without any other words, they would have been actionable; for Dung in Common parlance is understood of Dung in a heap, which was agreed to be a Chattel, of which Felony may be committed, and goeth to the Executors; but if it lieth scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the Freehold.

Mich. 23 Car. Banco Regis.

Pierson *versus* Dawson.

Slander.

SLander. The Plaintiff declares, That the Defendant, dixit Mariæ Pierson Matri W. Pierson the Plaintiff, your Son is a Thief; innuendo the Plaintiff, then the Son of the said Mary. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words are not said to be spoken of the Plaintiff, but only in the innuendo, which cannot sufficiently ascertain the Declaration, because she might have many Sons: But yet upon good consideration Judgment was given for the Plaintiff; for the Court shall not intend that Mary had any other Sons besides the Plaintiff. And Roll cited a Case where one said, your Landlord Henley is a Thief, and laid his Declaration only with an Innuendo of the Plaintiff then Landlord, &c. and adjudged good. But in another Case, where one said your Landlord (without a Surname) is a Thief, in such an Innuendo, it was, after great debate (the Court being at first divided in opinion) adjudged naught: But there if the Plaintiff had averred that he to whom the words were spoken had no other Landlord, it had been good. Vide French and Edward's Case, su. 3. 6

vide 6 Hob. 268. a. l. 4. 169. 17. f.

2 Salk. 513. Hillo R 346

More *versus* Clypsam.

Replevin.

IN a Replevin the Plaintiff declares, That the Defendant cepit centum oves matrices & vervices of the Plaintiffs. The Defendant avows, that his Father was seised in fee of the place where, &c. and died seised, and that the Lands descended to the Defen-

Defendant as Son and Heir, by virtue whereof he entred, and was ſeiſed in fee, and took the Beaſts damage feaſant; the Plaintiff makes a reply, and concludes with a traverſe abſque hoc that the Defendant at the time of the taking was & adhuc eſt ſeiſed in fee of the Land, and iſſue thereupon was found for the Plaintiff. And it was moved in arreſt of Judgment that the Traverſe was naught. 1. Becauſe the title of the Avowant is not anſwered, for that the dying ſeiſed of the Father, and the deſcent, and the ſeiſin of the Avowant, is but a concluſion upon that. 2. Becauſe the Traverſe is larger then the Avowry; for adhuc eſt, refers to the time of the pleading, which is more then is alledged, or then is material. To the firſt it was anſwered, that though it be not formal, yet it is ſubſtantial enough; for if the Son were not ſeiſed, there could be no diſcent to him, and therefore it is made good by the Verdict; and the Court inclined to this opinion. But the other exception was holden to be material. Then an exception was taken to the Declaration, becauſe it is for 100 Ewes and Wethers, and it doth not appear how many there are of Ewes, and how many Wethers; and the Sheriff is bound to make deliverance of the one ſort and of the other, for his delivery muſt be according to the Writ. And though he may receive information from the parties, ſo that it is a good return to ſay nullus venit ex parte querent' ad oſtendend' averia, &c. yet he is not bound to require it, but ought to have ſufficient certainty within the Record. And for this cauſe, after great debate, Judgment was given againſt the Plaintiff; but it was agreed, that oves without addition had been good enough, and the Sheriff might have delivered the one ſort and the other: But if the Writ be for oves matrices, the Sheriff cannot deliver Wethers; ſo if it be for Black Horſes, the Sheriff cannot deliver White, but is ſubject to an Action of Caſe. Now there being ſome Ewes and ſome Wethers, and the number not appearing, the Sheriff is left at uncertainty; and upon the ſame reaſon a Fourendon of 100 Acres of Meadow and Paſture hath been adjudged naught, as Roll ſaid.

1 Syd. 318
Hard. 59

1 Syd. 318

Com. Northumb. *verſ.* Green. Trin. 23 Car. *Rot.* 1198.

IN Debt for Rent the Plaintiff declares, That one Croſs made a Leaſe for years to the Defendant reſerving Rent payable half yearly, who granted the reverſion to the Plaintiff, and ſuch a day (which was the day wherein the Rent was due) the De- Debt.

fendant attorned; and for three years Rent and a half, which included the Rent due, the day of the attornment the Action was brought; and upon nil debet, and a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Rent was payable to Cross before the attornment; for that shall be taken (if most for the Plaintiff) to be after Sun-set; but it was disallowed: for the Court shall not intend it: and if they should, the Verdict supplies the averment of the contrary. And both the Judges said, that if a Writ abate one day, and another Writ is purchased, which bears teste the same day, it shall be intended after the abatement of the first.

Caly *versus* Joslin & Uxor'. Trin. 23 Car. *Rot.* 1282.

IN Debt for Rent upon a Lease for years against the Husband and Wife, Executrix, which was laid in the debet and detinet; upon plene administravit pleaded, and a Demurrer thereupon, the case was well debated by reason of contrary resolutions; for Hargrave's Case was reversed in the Exchequer, Co. 5. 31. because the Action was in the debet and detinet; but afterwards, 7 Jac. between the Lord Rich and Frank. in C. B. upon great debate it was adjudged good in the debet and detinet. And the like Judgment was given 9 Jac. in C. B. in Sir Henry Carye's Case. And after that, Pasc. 17 Jac. Rot. 346. B. R. between Paule and Moody it was adjudged good in the detinet only. And the like, 7 Car. in the Common Pleas, and the same year in this Court between Smith and Nichols; and the reasons of these contrary opinions was the inconvenience of the one side and the other; for in as much as the Executors cannot waive the Term, it were hard if the Rent should exceed the value of the Land, and they having no assets, that they should be charged in the debet of their own proper Goods, and yet if the Action must be brought in the detinet only, where fully administred were a good plea, then may they retain the Land, and with the profits thereof satisfie Debts upon specialty, whereby the Lessor should be defeated of his Rent: For the avoiding of which inconveniencies, it was resolved, that they may be charged in the debet and detinet, for prima facie the Land shall be intended to be of greater value than the Rent, and if it be otherwise, ———

Mich.

Mich. 23 Car. Banco Regis.

Gilbert *verſus* Stone. Trin. 17 Car. *Rot.* 1703.

IN Treſpaſs for breaking of a Houſe and Cloſe, the Defendant pleaded, that 12 homines ignoti modo guerrino armati tantum minabantur ei quod de vitæ ſuæ amiſſione dubitabat, and after requirebant & compulſabant the Defendant to goe with them to the Houſe, quodque ob timorem minarum & per mandatum & compulſionem dictorum 12 hominum he did enter the ſaid Houſe, and returned immediately through the ſaid Cloſe, which is the ſame Treſpaſs, &c. And upon Demurrer, without argument, it was adjudged no plea; for one cannot juſtifie a Treſpaſs upon another for fear, and the Defenant hath remedy againſt thoſe that compelled him: Alſo the manner of the pleading was naught, becauſe he did not ſhew that the way to the Houſe was through the Cloſe. Treſpaſs. Hob. 134. c. 1 Bulſh: 295 Mo 864 Raym: 423

Mark *verſus* Cubit. Paſc. 23 Car. *Rot.* 376.

SLander. You are a Rogue, you are a traitorly Rogue, you cheated your Father; you are a branded Rogue, you have held up your hand at the Bar; you have deſerved to be hanged, and I will have you hanged: And after a Verdict for the Plaintiff for all the words (except traitorly Rogue) the queſtion was, whether the words branded Rogue would maintain the Action (for it is clear, none of the others would) becauſe (as was pretended) the moſt that they impart, is, if he hath been branded for a Rogue by virtue of the Statute of 1 Jac. cap. 7. then his puniſhment is paſt, and conſequently the words not actionable, becauſe they cannot be any damage to him: But upon debate, Judgment was given for the Plaintiff; for by that Statute if a branded Rogue wander again, it is Felony; and ſo the words put him in a nearer degree of Felony than otherwiſe he ſhould be. Slander.

Brown & Wood.

ADministration was granted to the Sister of the half Blood of the Intestate and her Husband, by the Prerogative Court, and the Brother of the whole Blood sued there to have the Letters repealed; and upon motion for a prohibition, upon this suggestion it was agreed by the Court, that the Sister of the half Blood is in equal degree of Kindred with the Brother of the whole Blood, within the Statute. And so was it resolved, 1 Car. between Glascock and Wingate, known by the name of Justice Yelverton's Man's Case. And if the Ordinary hath once executed his power according to the Statute, he cannot repeal the Letters upon a citation; but it was resolved, that the Statute was not observed in the Grant of the Letters in this case, because the Husband, who is not of kin to the Intestate, is joyned with the Wife; and if she should die before him, he should continue Administrator against the meaning of the Statute. And for this cause a prohibition was denied; but it was said, that if it had been granted to them only during the Coverture, perhaps it might have been good, because the Husband might have administred during the Coverture, though it had been granted to the Wife only.

2 Vouch: 317

3 Eliz. 45
1 April 15[illegible]

Hil. 23 Car. Banco Regis.

Hilliard & Ux. *vers.* Hambridge. H. 22 Car. *Rot.* 1010.

Action sur le Case.

IN an Action upon the Case against an Executor upon a promise of the Testator made to the Husband and Wife, in consideration of their Marriage had at his request to pay 8 li. per annum to the Wife during the Coverture; after a Verdict for the Plaintiff, upon non Assumpsit pleaded, it was moved, Termino Hil. 22 Car. in arrest of Judgment, that it should be brought by the Husband only, the promise being made after the Coverture, because the whole benefit thereof is to redound to the Husband, and thereupon Judgment was stayed. But this Term the Case being moved again, Judgment was given for the Plaintiff; for it is in the election of the Husband to bring the Action alone, or to joyn with his Wife: as 43 E. 3. 10. 15 E. 4. 10. c.

10. c. 7 E. 4. 6. a. 7. a. Br. Baron & Feme 55. in case of a Bond made to them both after Coverture: And the Case was held to be stronger, because it is an Executory promise of a thing of continuance, than if it had been to be done unica vice. Vide 48 E. 3. 18. f. 16 E. 4. 8. c.

Eels *versus* Smith.

SLander. She hath married the Husband of another Woman. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words would not bear Action, for the Plaintiff's Wife might be dead, or beyond Sea by the space of seven years, and then the Case is out of the Stat. of 1 Jac. cap. 11. And though it be alledged in his Declaration that he had no other Wife, yet the words must be taken as they were spoken before the auditors. And perchance the meaning might be that the Plaintiff was contracted to, and so in Conscience was the Husband of another Woman; and Judgment was given against the Plaintiff. Slander.

Yates *versus* Lindall.

SLander. She is a Sorcerer and a Witch, and can witch and unwitch; she is a white Witch, and can witch and unwitch. And after a Verdict for the Plaintiff, Judgment was given against her, because she is not accused of any offence within the Statute. Slander.

Gawdy & Congham. Mich. 23 Car. *Rot.* 348.

IN a Writt of Error upon a Judgment in C. B. in an Action of Debt against Executors, who pleaded fully administred, and the issue being whether Assets or no, it was found that they had Assets for part onely; and Judgment was given for to recover the whole Debt. And it was moved by Hales for Error, that it should have been for so much only as was found in the Defendants hands, and so are all the Presidents in that Court, which he said he had caused to be searched; but the Judgment was affirmed. Error.

firmeth, for it is good either way; and in this Court it is the course to give Judgment for the whole, according to Mary Shiplie's Case. l. 8. 134.

Eeles *versus* Lambert. Mich. 22 Car. *Rot.* 357.

Covenant.

IN an Action of Covenant the Plaintiff declares, That Sir Moulton Lambert the Testator, did demise to him a Wharf, called the Wharf-ground near the Common Dike, and other Tenements, for 21 years; and Covenanted that he might quietly enjoy them without the interruption of the said M. L. his heirs or Assigns, vel aliquar' personar' clamantium per præd' M. L. hæred' vel assignat' suos vel per eorum medium consilium vel procurationem, nisi, &c. and assigns for breach, that one Mich. Clavel clamans titulum à præd' M. L. postea, scil. 20. Feb. 17 Car. did enter upon him, and eject him, &c. the Defendant pleads plene administravit, and Issue being joyned thereupon, the Jury found that Sir M. L. 15. Jun. 1634. made his Will, and made the Defendant his Executor; and by the same Will, dedit diversa legata bonorum in specie separalibus personis in dicto Testamento nominatis, ac postea obiit, post cujus mortem, the Defendant 11 Car. bona præd' sic ut præfertur in specie dat' ad valentiam 500 li. in executionem Testamenti præd' præd' separalibus personis in eodem Testamento nominat' deliberavit, and find the breach of Covenant to be six years after, and that no other Goods of the Testators came to the hands of the Defendant; & si, &c. pro querent', &c. And the Case was argued by Green and Latch ex parte querentis that the Goods delivered for Legacies are Assets in the Executors hands, as to this contingent Covenant.

1. That the Executors shall be intended conusant of all Contracts and Duties of the Testators, as well present as future, as well contingent as certain; and that therefore this contingent Covenant lay as a charge upon the Testator's Estate.

2. That such contingent Covenants are common assurances much favoured in Law, which may all be easily defeated, if the disposition of the Covenants by his Will should stand good against them; for though the Executors should afterwards voluntarily break them, yet the recompence must be had only out of the Testator's Estate.

3. A diversity was taken between Debts without specialty, and Lega-

Legacies, for those are duties of the same nature with Debts upon specialty, but differ only in order and dignity; but these are meer gratuities, for which no Action lieth at the Common Law; and therefore are not taken notice of by Law as duties, but the remedy for them is in the Court Christian.

4. The Executor was not compellable by the Ecclesiastical Court to pay these Legacies, unless the Legatees in this case would give caution to repay them if the contingent Covenants should be broken. And so it was said is the course in Chancery at this day in the like cases. And Hales and Twisden ex parte Defendentis argued to the contrary.

1. It was agreed by them, and also by the Court, that though the Legacies were devised in specie, yet the Legatees could not take them without the assent of the Executors. And that therefore the Case was the same as if the Legacies had been of money. Indeed there is a difference between these Legacies; for Legatum quantitatis est Legatario, as Legatum in specie est.

2. It was agreed, that if the Covenant had been broken before the delivery of the Legacies, the Administration would have brought a Devastavit; but the Legacies being first delivered, it was argued, that the Executors ought not to be charged in a Devastavit upon this Covenant.

1. From the nature of the thing it self; for a Covenant is no Duty, nor cause of Action, till it be broken; and therefore is not discharged by a release of Actions: And when it is broken, the Action is not founded meerly upon the specialty, as if it were a Duty, but savours of Trespass; and therefore an Accord is a good plea to it, and ends in damages.

2. From the qualification of it in respect of the contingency of the breach thereof; for it is to be presumed, that it will be rather performed than broken.

3. From the inconvenience that such a Covenant should obstruct the performance of the Will, for it is a present and certain mischief, that Legacies should not be paid; and it is but a possible and contingent mischief that the Covenant should be broken, and the Covenantee unsatisfied; and therefore admitting that it were in place where by custome a rationabili parte bonorum would lie, it would be very hard that the Children should expect, till it were known whether the Covenant would be broken or no, which may perchance continue in suspense for ever; for such Covenants are commonly annext to Estates in fee. Now the reason is the same in case of Legacies; for where it hath been said

that the Common Law takes no notice of them, so as to give remedy for them, it was answered,

1. That the Law takes notice of a Legacy so as to create a Duty in the party to whom it is bequeathed, though he cannot take it without the assent of the Executors; for after such assent the Law vests the property of the thing bequeathed in the Legatee, and therefore a Condition imposed upon the assent is void.

2. The Probate and adverring of Wills did belong originally to the Jurisdiction of Temporal Courts, where the Legatees might have had remedy for their Legacies, as appears by Glanvil, lib. 6. cap. 6, & 7. where there is a Writ to demand a Legacy at the Common Law; and now that the Jurisdiction is devolved to the Ecclesiastical Court, the Common Law takes notice of the remedy there for Legacies; for the power of that Court is regulated by these, and therefore forbearance of Suit there hath been adjudged a good consideration of a promise; and for the same reason Hale said he conceived, that if an Executor of his own wrong paid Legacies, the rightfull Executor should be bound thereby, because he was compellable by Law to pay them.

3. Though the Executor were not compellable by Law to pay the Legacies, yet now that payment is executed, the Law takes notice of it to vest the property of the Goods in the Legatees. And this being before any Covenant broken, the Administration will be good. As to the Objection concerning provisional payment of Legacies, it was answered,

1. That it is the common case almost of all persons that have any dealing in the Kingdom, to make such Covenants, and to give Portions to their Children by Will, and this is all the maintenance many of them have; and therefore it is difficult for them to find security for the payment of that whereof they live.

2. Though the Ecclesiastical Court, in a prudential way, use sometimes to take caution for repayment, yet they are not bound so to doe. And therefore this Court cannot take notice thereof.

3. It hath been agreed, that payment of Debts upon simple Contracts is a good administration against Judgments defeasible upon performance of Covenants; and yet the same provisional payment might be made in that case, but the Law doth not compell it, pur que, &c.

And the Case being thus argued, the last Trinity Term, and this

this Term, two Exceptions were taken by Bacon to the Declaration,

1. That the Plaintiff hath not conveyed to himself a good Title to the Tenements, for he alledges a demise of them habendum to the Plaintiff, but he is not named in the premises; but this was after agreed to be well enough, for a Lease so made is good. And Latch said it had been so adjudged.

2. That the breach was not well assigned, for the Covenant is against all persons, claiming by the assent, means or procurement of Sir Moulton; but the breach assigned is, that Clavel clamans titulum from Sir M. did enter, now he might claim Title from him, when as in truth he had no Title from him. And for this cause Judgment was given against the Plaintiff. And the Judges would not deliver their opinions upon the matter in Law, but upon the Arguments. Roll did incline for the Plaintiff, upon the provisional payment that might be made, and said, that Prohibitions have been denied upon suggestion of a Suit in the Ecclesiastical Court, where contingent charges have been pleaded, because this Court takes notice of provisional payments which are used to be made there; also he approved of the diversity between Debts without specialty, and Legacies. And Bacon inclined to the Defendant for the reasons before alledged.

Hil. 23 Car. Banco Regis.

Holdwich & Ux. *vers.* Chafe. Pasc. 23 Car. *Rot.* 326.

IN an Action of Debt by the Husband and Wife Executrix, upon a Bond supposed to be made to the Testator, non est factum being pleaded, it was found to be made to the Testator and another, who died before the Testator. And if it were his Deed modo & forma prout, &c. was referred to the Court. And Maynard argued for the Plaintiff. 1 Syd. 230 272 420

1. That the Plaintiffs might declare as upon a Bond made to the Testator only, because the Duty accrued to him only by survivorship. And cited 35 H. 6. 38. h. where a Lease was made to two persons rendring Rent; and one dying, Debt was brought against the survivor, as upon a Lease made to him only; so Inst. 185. b. Dyer 133. h. 1 Syd. 230 272.

where two Jointenants were joyned in a Leaſe, and one releaſed to the other in an Action of Waſte, he counted of a Leaſe made by himſelf only, and adjudged good. 46 E. 3. 17. c. 33 H. 6. 4. h. ſo it is where a right only ſurvives, as Mich. 18 E. 2. in a Caſe not printed. H. 6 E. 3. 12.

2. Infants Jointenants joyned in a Feoffment, and one died, the ſurvivor brought a dum fuit infra ætatem, and declared that the Tenant had not the land niſi ex dono of the Demandant, dum fuit infra ætatem. And the Tenant pleaded in abatement, that it was conveyed to him by them both; the Demandant replied that the other was dead, and adjudged for the Demandant. (Note the ſame Law holds where a charge ſurvives, as if two joyn in a Bond, the Obligee may have Debt againſt the one only; And it was no plea for him to ſay it was made by him and another, unleſs he ſay he is in full life, as appears 28 H. 6. 3. c. & ſu. 11. a.) But where nothing ſurvives, there the Caſe ought to be alledged as the truth was; as if two Jointenants make a Feoffment, and the one dies, the Feoffor cannot plead this as a Feoffment made by the ſurvivor only: Otherwiſe where a Feoffment is made to two, and one dies. 14 E. 4. 1. h.

3. The matter of variance goes but in abatement, and therefore cannot be pleaded in Bar; alſo non eſt factum is no plea in the Caſe: And Whelpdale's Caſe, l. 5. 119. was cited, and Judgment was given for the Plaintiff without further argument. Nota, if the Defendant in this Caſe had demanded Oyer of the Deed, and cauſed it to be entred in hæc verba, he might have demurred to the Declaration, as ſhould ſeem by 36 H. 6. 16. d. g. & 32. a. & l. 5. 76. e. And the Court ex officio ought to have abated the Bill: So Note the difference. And ſee Blackwell and Aſhton's Caſe. ſu. 11. a. 21 vide 21

Royſton *verſus* Cordrye. Trin. 23 Car. *Rot.* 1677.

Debt. Hy: 80 ...

IN an Action of Debt brought againſt an Executor upon a Leaſe for years made to the Teſtator for Rent due after his death in the detinet: after a Verdict for the Plaintiff quod detinet, it was moved by Hales in arreſt of Judgment that the Action ought to have been in the debet and detinet for the reaſons in Hargrave's Caſe, l. 5. 31. for nothing ſhall be aſſets but the ſurplus of the value of the Land exceeding the Rent. And therefore the profits of the Land proportionable to the Rent are taken Pollex. 129

to

to his own use, and therefore he is to be charged as for his proper Debt; and it cannot be presumed that the Land should be of no value, but contrarily that they should be of greater value than the Rent. And therefore in an Avowry upon an Abbot for Rent he cannot disclaim generally, unless he shew that the Land is of less value then the Rent. 43 Ass. pl. 23. 16 H. 7. 2. so that if the Land here had been worth nothing, or of less value than the Rent, the Plaintiff ought to have shewen it in his Declaration, for this cannot be made up by the Verdict; for (besides that the intendment is too remote to be supplied, for which see King and Somerland's Case, su. 9. a.) the Verdict is true though it be otherwise; for he that is said debere & detinere may well be said detinere. ante 19. 34

2. The Executor is now charged as Ter-tenant, and not upon the privity of Contract with the Testator, and therefore the Action will not lie against him after Assignment; and for the same reason it ought to be brought where the Lands lies, so that he ought to be charged in the debet and detinet in respect of the Land and the profits, and not in the detinet, as upon the Contract. But yet upon debate Judgment was given for the Plaintiff, for the Executor demands his interest, whereby the Charge accrues from the Testator, so that he may answer the Rent out of the Testator's Estate, and the sole inconvenience is to the Plaintiff himself, who waives his advantage to demand satisfaction out of the Estate of the Defendant, and contents himself with what the Testator's Estate will afford; and therefore it was never doubted but that the Action might be brought in the detinet only; but it hath been much doubted whether it might be in the debet and detinet. Vide Caly and Joslin's Case, su. 15. Also Roll said that in many places the Land becomes of no value by reason of the troubles, and then he ought to be charged in the detinet onely. And the Verdict doth supply this Intendment. 3 Mod 326 ante 34

Hil. 23 Car. Banco Regis.

Page and Harwood.

PAge and Harwood, and one were indicted at the Assises at Nottingham upon the Statute 1 Jac. 8. for stabbing one And the Indictment was, that stabb'd him, Indictment.

him, and Page and Harwood were present, abetting, &c. and contra formam Statuti, and all there were found guilty contra formam Statuti, and was hanged in the Countrey; but Roll doubted whether these two were within the Statute, and therefore adjourned them hither. And Walker produced a President 16 Car. where one Welsh and five others were indicted at the Sessions in the Old Baily upon this Statute for the death of one Swinnerton, and because all five were present, and it could not appear upon the Evidence which of them gave the thrust, Bramston Chief Justice, Barkley and Jones directed the Jury to find them guilty of Manslaughter only at the Common Law; for though in Judgment of Law every one that is present, &c. is principal, so that the Indictment may recite that any of them did make the thrust, and the Jury should have found them equally guilty at the Common Law, yet in construction of this Statute, which is so penal, it shall be extended only to such as really and actually made the thrust, and not to those which by construction of Law only may be said to make it; for the end of the Statute was to restrain the rage and cruelty of such persons as would suddenly stab another. And accordingly it was resolved in this case that the offendors should have their Clergy.

5 Mod R 308
1 Salk 212 213

Then another question was made upon the Indictment, which is contra formam Statuti, and accordingly they were all found guilty by the Jury, whereas it appears that these are not guilty within the Statute: But it was answered and resolved, that upon this Indictment they might all have been found guilty at the Common Law; then when all are found guilty within the Statute the Verdict shall be taken as it may stand by Law: And the substance of the Indictment being found the rest is but surplusage which hurteth not the Verdict: And the Court held that the Indictment need not conclude contra formam Statuti, because the Statute doth not alter the nature of the offence, but only takes away the privilege which the Common Law allowed in such case; and therefore it is sufficient that the circumstances be expressed in the Indictment, whereby it may appear that the offence is within the Statute, and the Offendors had their Clergy, and upon their reading were burnt in the hand in conspectu curiæ.

5 Mod R 308

Price

Price *verſus* Vaughan. Trin. 14 Car. *Rot.* 1160.

IN an Ejectione firmæ upon a ſpecial Verdict upon not guilty pleaded, the Caſe was briefly thus. Walter Vaughan being ſeiſed in Fee of the Land in queſtion, deviſed it to Francis his eldeſt Son, and the Heirs males of his Body; the remainder to his ſecond Son, and the Heirs males of his Body, with other remainders; the remainder to the Heirs males of the Body of the Deviſor, provided if the eldeſt Son ſhould die without Iſſue male; but having Iſſue female, then I do give full power and authority to the ſaid Daughters to enter into the Lands, and to take the profits thereof untill he that firſt ſhall have the Lands, after the death of Francis, ſhall pay to each of them 400 li. towards their Marriage, and dies; Francis dies without Iſſue male, having a Daughter Elizabeth, who entred into the Lands, and died, the 400 li. being unpaid; her Adminiſtrator enters, and Leaſes to the Plaintiff, upon whom the younger Son of the Deviſor enters, and him ejects; and if upon the whole matter the entry of the Adminiſtrator was lawfull, they find for the Plaintiff: And the queſtion in Law was, what Eſtate Elizabeth had, and it was argued by Hale, Maynard and Brown for the Plaintiff. Ejectione firmæ

1. That ſhe had an intereſt; for an authority to take the profits implies as much as a deviſe of the profits, which gives an intereſt. 5 H. 7. 1. a. 27 H. 8. 16. r. Dyer 210. d. Br. Deviſe 48.

2. It is a Chattel, like to the caſe where a feoffment is made rendring Rent, with proviſo that if it be arrear, the Feoffor may enter and hold the Land till it be paid; this gives a Chattel to the Feoffor: And ſo it is if the arrears were to be ſatisfied out of the profits of the land: And ſo it is in caſe of a deviſe to Executors till debts be paid. And ſo Brown ſaid it was reſolved in a Caſe between Eire and Haggard, Hil. 13 Jac. Rot. 868. C. B. where a Rent was granted out of the Lands, and if the Rent were behind, that the Grantor might enter into the Land and hold it till he were paid, that this was but a Chattel.

3. It was argued that this Chattel was tranſmiſſible to the Adminiſtrator, becauſe if the portion it ſelf had been deviſed, though it were toward Marriage, it would have gone to the Adminiſtrator: Now though the profits of the Land are but a gage till the portion be paid, yet it follows the Portion; as 20 H. 7. 1. a. as if a nomine pœnæ deſcend to the Heir with the Rent, ſo if Lands

are devised to Executors for payment of Debts, it goes to their Executors; and the Executors of Tenant by Elegit shall have an Assise, for the remedy goes with the duty, 2 Inst. 396. e. And in this case if it should not be so, the Portion might not be paid, which were contrary to the meaning and letter of the Will; for there is an express proviso, that the Lands shall not remain over till the money be paid; and Twisden and St. John, Solicitor, argued to the contrary. But St. John did admit it to be an Interest, but that it was no Chattel.

1. Because the devise is found to be in pursuance of Articles of agreement made for the like settlement to be made by the Testator in his life-time, but if such a settlement had been made in his life, it would have given a Freehold for life, and not a Chattel.

2. The devise was for advancement of Daughters, and it is found by the Verdict that 1200 Acres of Land are devised, in which, if the Daughters should have an Estate for life, it cannot but be intended to be as great or greater advancement, than if 400 li. only had been devised to them; and yet that the Testator lookt upon as a sufficient provision: And therefore made the Estate determinable upon payment of that.

3. It cannot be thought that the Testator intended to give the whole Land to the Daughters, and to debar the Issue male of his younger Sons; and yet as this Will is penned, if it should not give a Freehold, then if the first man dies before payment, the Daughters should have it for ever; and Dyer 300 b. was cited. And for this cause also it cannot be a Chattel; for there cannot be a perpetuity of a Chattel upon no supposal; and therefore there is no more reason to say it should be a Fee in them than a Chattel. 2. If it be a Chattel it goes not to the Executors or Administrators.

Poller 117 1 Syd: 102 1 Brownl 35 287 2 Brownl 63 Cro: Car: 68 1 Vent: 229

1. Because it is personally limited to the Daughters, and not to their Executors and Administrators.

2. It is limited to them for their advancement, which doth not respect their Executors.

3. If it should goe to the Executors, then there would be a perpetuity of it. As to the Cases objected by the Plaintiff's Counsel, as 27 H. 8. 5. which was much insisted upon; where cestuy que use Covenants that his Feoffees shall suffer one of his Executors and Assigns to take the profits of the Land till he or they be paid 100 li. by the Covenants, &c. if he dies before he hath received it, his Executors shall hold it till they be paid: It

1 Syd 102

was

was answered, that this was in case of a Use, which was then ruled meerly according to equity, and by express words it was limited to the Executors; and there it was for money paid by the Covenantee, and so for a Duty which goes to the Executors. And for the case of a Devise to Executors for payment of Debts, there it is a Chattel in them which goes to their Executors, because otherwise Debts should not be paid, which is the special reason of that case, for such an Estate made by Grant will be an Estate for life, 1. 8. 96. c. And in the case of retaining Land till a Rent be paid, there the Land is taken but as a Distress, till the Rent which is a duty issuing out of it, be paid; but in our case neither the person nor the Land is Debtor, for no Legacy is devised to the Daughters, the Devise is only that they shall hold the Lands until, &c. And it had been all one case if it had been made determinable upon any other limitation, as upon payment of money; also in all those Cases the Interest is determinable some way or other; but in our case it should be perpetual upon the contingency aforesaid.

Hil. 23 Car. Banco Regis.

Petchet *versus* Woolston. Pasc. 23 Car. *Rot.* 497.

Scire facias.

JUdgment was had against an Administrator in a Scire facias upon a Judgment against the Intestate, and a Fieri facias awarded; and upon nulla bona returned, and a testatum of Waste, a special Fieri facias was awarded to the Sheriff, quod si sibi constare poterit per inquisitionem, vel aliter, that the said Administrator vendidit elongavit vel ad usum suum proprium convertit the Goods of the Intestate, tunc scire faceret the Defendant why execution should not be had of his proper Goods; the Sheriff returns an Inquisition which finds a devastavit, and that Scire fac', &c. whereupon the Defendant comes and pleads payment, and an Acquittance as to part, and to the residue fully administred at the time of the first Scire facias awarded; whereupon the Plaintiff demurred, and the Case was argued the last Term, and this Term, that the plea was insufficient.

1. Because the plea was argumentative only, and did not directly answer the Charge by the Inquisition that he wasted the Goods of the Intestate, which being but an inquest of Office is traversable.

2. Fully adminiſtred is no good plea to a Charge by Judgment, for this ſuppoſeth the Goods came to his hand which he hath adminiſtred; and that he ought not to averr generally in reſpect of the height of the Charge, which being by Judgment binds the Goods of the Inteſtate in his hands, and therefore he ought to ſhew ſpecially how he hath adminiſtred. And Hales ſaid that for this very cauſe, Paſc. 39 El. Rot. 14032 between Ordway and Godfrey fully adminiſtred pleaded to a Scire facias upon a Judgment againſt the Teſtator upon a demurrer was judged inſufficient, and the like Judgment was given upon the ſame plea to a Scire facias, upon a Debt aſſigned to the King, Paſc. 2 Car. Rot. 28. in Ireland's Caſe: But he ſaid if Iſſue were joyned it was helped, and ſo it was adjudged. Hil. 11 Jac. Rot. 19063. between Haper and Renold. To which it was anſwered by Maynard,

1 Bro: 575
1 Salk. 296
4 Mod R. 296

Dyer 80. a.

1. That an argumentative plea is ſufficient upon a general demurrer, but in this Caſe the Charge is not that he hath waſted the Goods of the Inteſtate, but the Writ requires us to ſhew cauſe why the Plaintiff ſhould not have execution of the proper Goods of the Defendant: And we ſhew for cauſe that we have fully adminiſtred, which is a more proper plea than to traverſe the Inquiſition.

2. Though the Charge be by Judgment, yet we might have well adminiſtred, as by paying Debts upon other Judgments; and ſo ought the plea to be intended which is confeſſed by the Demurrer.

And Roll openly declared his opinion, the caſe being argued both the laſt and this Term, that the plea was good upon a general Demurrer; and for the Caſe of Ordway and Godfrey, he ſaid it did not appear whether the Demurrer were ſpecial, but he ſaid that Yelverton after he was overruled in it, ſaid openly at the Bar, that he would maintain the plea to be good: And he ſaid that it is a better plea in it ſelf than to traverſe the waſting of the Goods. And Bacon at firſt ſeemed to be of the ſame opinion, but was moved by the Judgments cited by Hale: But it was agreed that the beſt pleading were to ſay that no Goods came to his hands, except ſuch and ſuch, if any did, and ſhew how he adminiſtred them: And by perſwaſion of the Court the Demurrer was waived, and the parties pleaded to Iſſue.

Simmons

SImmons & alii were indicted for a forceable detainer of the Lands of one Egerton, within the County Palatine of Cheſter, and reſtitution granted there: And now the Indictment being brought hither by Certiorari, it was moved, that their Juriſdiction there is excluſive, ſave only in caſe of Treaſon, or Writs of Error; and therefore the proceedings here would be coram non Judice; and the Court doubted what ſhould be done, becauſe no priviledge is returned, and reſtitution was awarded below after the Indictment removed. But after Bacon openly declared, that forasmuch as Indictments upon the Statute of 8 H. 6. ought to be taken before Juſtices of the Peace; and the Juſtices of Peace, as well in Cheſter as otherwhere, by the Statute of 27 H. 8. cap. 5. & 25. ought to be made by Letters Patents under the Great Seal, their proceedings there, quatenus Juſtices of the Peace, are ſubject to the Juriſdiction of this Court. And the Indictment was, that Egerton was ſeiſed of the Land, ut de libero tenemento pro termino vitæ ſuæ, & ſeiſinam ſuam prædictam continuavit, quouſque the ſaid Simmons & alii pacifice intraverunt ſupra poſſeſſionem ſuam exiſtent' liberum tenementum ſuum, & eum adtunc & ibidem vi & armis diſſeſiverunt, contra pacem Domini Regis, & contra formam Statuti, &c. And exceptions were taken to the Indictment.

1. Becauſe it did not conclude contra coronam; &c. but only contra pacem.

2. Becauſe it is not ſaid adtunc exiſtent' liberum tenementum, and that is not ſupplied by the intendment of the words diſſeſiverunt; but thoſe exceptions were diſallowed. 1 Salk. 261

3. It concludes contra formam Statuti, where it ought to be ſtatutor' for the Statute of 8 H. 6. cap. 9. is relative to the Statute of 15 R. c. cap. 2. and recites it, and then the words are joyned thereto, the Caſe of peaceable Entry, and forcible Detainer; and ſo this Statute is but ſupplemental of the other:

But to this it was anſwered, that this Statute firſt recounts the defects of the Statute of 15 R. 2. and then confirms it; and after provides for the caſe of peaceable Entry and forcible Detainer, to which the Statute of 15 R. 2. did not extend; ſo that as to this clauſe it is a new diſtinct Law, and conſequently the Indictment good.

But to that it was replied, that the Statute 8 H. 6. goes on and provides, that in case of forcible Detainer, after complaint made to the Justices of Peace, they shall cause the Statute of 15 R. 2. to be duly executed; by which Statute the Offendor is to be fined and imprisoned; so that this Statute grants only restitution, and refers the other punishment to the Statute of 15 R. 2. So then upon this Indictment contra formam Statuti, taking it to be that of 8 H. 6. as it must be, the Offendor cannot be punished within that of 15 R. 2. And so the King should lose his Fine. And for this cause, after several debates, Roll held the Indictment insufficient, but Bacon contra, because the ancient Precedents both of Indictments and Actions upon the Statute, did use to recite this Statute only; but now the course is according to my Lord Coke's advice, Co. 4. 486. not to recite the Statute, but conclude it contra formam Statuti: Vide Dalton cap. 129. And he said it would be very mischievous to subvert so many Precedents as have been this way; but the best way had been to have writ it Statut' with a Dash, for then it would have stood as by Law it ought.

4. It was excepted, that the Indictment is quod pacificæ intraverunt, &c. eum adtunc & ibidem vi & armis disseisiverunt. More 272 And for this cause, after much debate, (this exception being at first allowed) for the repugnancy; the Indictment was quashed, and re-restitution awarded, nisi causa ostensa sit in contrar' initio proxim' Termini.

Doctor Bruce's Case.

Habeas Corpus. Upon a Habeas Corpus Dr. Bruce being returned committed upon the Stat. of 1 Mar. ca. 3. for disturbing the Minister of Maidstone in Kent, lawfully authorized, in his publick Prayer and Preaching; it was agreed, that that part of the Statute of 1 Mar. which concerns disturbance in Preaching, is not repealed by the Statute of 1 El. but as to disturbance in Prayer it is. And the commitment for both is naught: And for this and other gross faults in the return he was discharged.

Samuel

SAmuel Hall was found dead before the Coroner, that he paſſing a Bridge between Worthington and Billingford in Comitatus Hertf. by reaſon of a breach in the Bridge fell into a River, where he was drowned; and that the Bridge is in villa de & in magno decaſu by default of the Inhabitants there: and it was holden, that the Coroner may find ſuch a nuſance as occaſions the death of a man; and that the Townſhip ſhould be amerced thereupon; but becauſe it was not found here that the Town was bound to repair the Bridge, the Indictment was quaſhed as to that.

Paſc. 24 Car. Banco Regis.

Roſe *verſus* Spark. Hil. 22 Car. *Rot.* 29.

IN an Action of Debt upon an Arbitrement for 7 li. 10 s. the Plaintiff declares, That whereas there were certain Controverſies between the Plaintiff and the Defendant touching a Wine-license, and the arrears of Rent iſſuing out of certain Land, they did ſubmit them to the Arbitrement of J. N. and J. S. ſuper quo præd' J. N. & J. S. accepto ſuper ſe mod' arbitrand' de præmiſſis, intellexerunt quod reſtabant debitæ to the Plaintiff, quindecem libræ de quibus quidem 15 li. ordinaverunt, that the Defendant ſhould pay 7 li. 10 s. to the Plaintiff, in ſatisfaction of 7 li. 10 s. parcel of the ſaid 15 li. and ſhould aſſign the Wine-license to the Plaintiff, per quod actio, &c. And after a Verdict for the Plaintiff upon nil debet, it was moved Termino Paſchæ 23 Car. & Termino Hil. 23. And again this Term. Arbitrement.

1. That the Award is not of the thing ſubmitted, for the ſubmiſſion is ſpecial of the arrears of Rent and a Wine-license: And the Arbitrators find the Defendant indebted in 15 li. but it appears not for what he was ſo indebted, ſo that it might be for ſome other cauſe than for Rent; therefore the Plaintiff ought to have averred that the Debt was for the Rent, or at leaſt to have laid the Award to be de præmiſſis, which perchance would have ſupplied it; but this exception was diſallowed, for the Award being

being general ought to be intended according to the undertaking, which was de præmissis; and this Intendment is confirmed by the Verdict: And it was said that the words de præmissis in pleading Awards, hath been used but of late time; but to good purpose to apply the general words of the Award proportionable to the things submitted: Also the words super quo help the Intendment.

2. (Which was the principal exception) It was moved, that the Award was void, for that the Arbitrators recite 15 li. to be due to the Plaintiff, and award that the Defendant shall pay 7 li. 10 s. in satisfaction of 7 li. 10 s. parcel of the Debt, and shall assign the Wine-license; but this is not said to be in satisfaction of the residue, so that here remains 7 li. 10 s. parcel of the Debt not satisfied nor discharged; and Roll was of opinion, and that as to the Assignment of the Wine-license that the award was void: But Bacon held, that it should be intended in satisfaction of the other 7 li. 10 s. But both the Judges agreed, that forasmuch as the submission was not with an ita quod, &c. the Award as to the parcel was good according to the Books. Co. 8. 98. d. 19 H. 6. 6. h. 22 E. 4. 25. g. and so Judgment was given for the Plaintiff. Note here, though the submission were of the Rent and a Wine-license, the Award was only of the Rent, which could not have been alone submitted.

Hart *versus* Buckminster. Hil. 23 Car. *Rot.* 225.

Debt. IN an Action of Debt upon a Bond with Condition, reciting, That whereas the Plaintiff had carried 12000 Billets for the Defendant to Dartmouth, if the Defendant should pay the Plaintiff after the rate of 17 s. per 1000. then the Obligation should be void; the Defendant upon Oyer thereof pleaded, that the Plaintiff did not carry 12000 Billets to Dartmouth; and upon Demurrer Judgment was given for the Plaintiff, for the Defendant is estopped to deny it.

Hobson

Hobson *versus* Wills.

IN an Action of Debt brought by an Administrator, the Plaintiff declares of Letters of Administration granted to him per Carolum Regem, &c. without saying debito modo, &c. And upon a Demurrer to the Declaration it was adjudged good, because the King hath universal Jurisdiction here. Debt. Thom. Litt: 342 1 Salk: 41 2 Bulst: 3: 4 2 Roll 47

Bamfield *versus* Brown.

IN an Ejectione firmæ upon a Trial at the Bar evidence was given, that Sir John Brooke, Lord Cobham, sealed an Indenture of Lease of Black acre, Green acre, and White acre; and by Letter of Attorney reciting, that whereas he had made an Indenture purporting a demise of Black acre and White acre, (omitting Green acre) as by the same more at large appears, &c. gave power to deliver it as his Deed upon the Land, and also by word of mouth commanded the Attorney to do the same thing; and Roll inclined, that the Letter of Attorney was insufficient in respect of the omission; but Bacon contra clearly, because there is a description sufficient to shew it to be the same Lease; but both agreed that in Debt for Rent upon a Demise such a mistake in the Declaration were fatal, because there he takes upon him to recite the Demise upon Record as it was made upon a Contract, which being entire, an omission of part makes it not the same Demise, and the Action is founded upon it, but here he is only to describe it in pais; but they held that the party might deliver the Lease by virtue of the authority given him ore tenus, notwithstanding the Letter of Attorney; but then he must swear he did it by virtue of that, for if he did it by virtue of the Letter of Attorney, the other authority will not avail the delivery; and it was said that he could not deliver it by virtue of both authorities, quod quære. Ejectione firmæ

Pasc. 24 Car. Banco Regis.

Lawrence *versus* Kete and others.

Ejectione firmæ

IN an Ejectione firmæ upon Issue whether it were a Devise by Will in writing or not, between Mrs. Dunsh, Widow, and Edmund Dunsh the Heir: The Case upon the Evidence was, That Dunsh the Husband, being sick, said, that he devised all his Lands to his Wife for life, and limited several remainders of several parcels of them; and about an hour after wished and desired that one Kete were there to write his Will: whereupon the Wife, without acquainting her Husband with it, sent for Kete, who from the mouth of the Witnesses which heard the Devise wrote the same; but because they differed in their Testimony touching the limitation of the remainders, he wrote two Wills, and this was without privity of the Husband, who before the writing finished became senseless, and soon after died: And the original Writings were both lost, but a Copy testified to be of the same effect was produced; and after much Dispute it was agreed by the Court, and so given in charge to the Jury.

1. That an actual Devise by word is no sufficient ground for a stranger to write the Will, but there ought to be an Actual Will, and desire that it should be written, and a bare wishing is not sufficient, but there ought to be an actual willing.

2. That this desire ought to be in some short space after the Devise, so that it be as one continued act; for if the Devise be at one time, and at another time the Devisor sends for one to write his Will, a new Declaration will be necessary to make it effectual.

3. That an actual desire of the Husband, that Kete were there to write his Will, was a sufficient ground for the Wife to send for him, though the Devisor gave no express directions to doe it.

4. That

4. That the writing of the Will from the mouth of Witnesses was sufficient, and it need not be from the mouth of the Testator.

5. If Witnesses agree as to the Devise for like, the Will stands good for that, though they disagree as to the limitation of the remainders.

6. Though the Devisor becomes senseless before the Will be written, yet if it be written before he dies, it is a good Will in writing.

7. If a Will continue in writing at the time of the death of the Testator, though it be lost or burnt afterwards, it stands good; but if it be burnt at the time of his death, then the Devise is void. And the next day the Jury gave a Verdict against the Will, because the Evidence was not clear as to the desire of the Devisor to send for Kete, but there was a motion for a new Trial, upon pretence of partiality in some of the Jurors; sed non prævaluit.

Hill *versus* Armstrong. Hil. 23 Car. *Rot.* 931.

IN an Action of Debt upon a Bond, with Condition to pay 300 li. to the Plaintiff, and to adde 3 li. to every Hundred if it were demanded: The Defendant pleaded payment of the 300 li. and that he added 3 li. to every Hundred secundam formam conditionis prædict'. The Plaintiff traversed the addition of 3 li. to every Hundred secundum formam conditionis prædict'. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Plaintiff ought to have alledged a Demand: And for this cause Judgment was given against the Plaintiff; for this being matter of substance, without which the Plaintiff had no cause of Action, was not helped by the Issue nor Verdict, notwithstanding Debt.

standing the words secundum formam conditionis, which was pretended to imply a Demand.

Hill & Uxor' *versus* Bird & alios.

LEtters of Administration of the Goods of Sir John Lamb, Intestate, were committed by the Prerogative Court to the Wife of Hill, being near to the Intestate; and upon a suggestion of a Suit there, by others of equal degree, for a distribution of the Goods of the Intestate, according to agreement made by the Administration, as was pretended, Hale prayed a Prohibition, and it was granted; for the Statute wills, that Administrator be granted to the next of kin for their advantage; and when the Ordinary, &c. hath once executed his power according to the Statute he cannot alter it, nor hath any power to compell the Administrator to make distribution notwithstanding the Agreement. And Hale said, that the Court there threatned to repeal the Letters granted, unless she would bring in a true Inventory of the Estate of the Intestate, and give a true account of her Administration; to which Roll answered, that the Court there may cite her to bring in an Inventory, and to give an account, but if it appear that they goe about to repeal the Letters for not doing of it, you shall have a Prohibition, which was not denied by Bacon. And Hale would have had a Prohibition against all the Cosins, as well those that sued there as others, because the proceedings there being ore tenus, the rest may joyn in the Suit when they will, but the Court denied to grant any Prohibition, quia timet, &c.

1 Jyd. 372

Pasch.

Paſc. 24 Car.

Creſwell & Uxor *verſus* Ventres & Uxor. Hil. 23 Car. *Rot.* 969.

SLander. Thou didſt, and doſt buy, and didſt receive ſtolen Goods; witneſs a Featherbed-Tike thou haſt in thy Houſe, and the Cloath thy mans Clothes are made of. And I will prove it. And thou didſt know that they were ſtollen. Slander.

1 Jyd. 413. 1 Roll. 72
yoh. 4 2 Roll. 494
1 Bulk 109

And after a Verdict for the Plaintiff upon the motion of Wilde, That the words do not charge the Plaintiff with Felonious receiving. And though ſhe knew that they were ſtollen, this doth not argue that ſhe was conſenting to the ſtealing; for ſhe might come by them honeſtly and rightfully, as if they were ſold afterward in Market overt; Judgment was ſtayd. And Roll ſaid he had known Judgment arreſted for the like reaſon.

Spatchurſt *verſus* Sir Mat. Minns. Hil. 23 Car. *Rot.* 1407.

IN Debt by an Adminiſtrator for Rent reſerved upon Aſſignment of a terme of years in a Houſe in St. Martins in Campis, by Deed made by the Inteſtate. The Plaintiff alledges that the Defendant had enjoyed the Houſe pro & durante totô prædicto Termino, and for 90 li. due at 1643. Termino adtunc nondum finito the Action is brought. And after a Verdict for the Plaintiff, it was moved by Boreman, That this reſervation is not properly of a Rent, but of a Sum in groſs; and for a Sum in groſs no Action lieth till the laſt day of payment; now it doth not appear that the laſt day of payment is paſt: For though it be alledged that the Defendant hath enjoyed the Houſe during the whole terme, this may be not till after the Sute commenced. Debt.

2. That this being a Sum in groſs and no Rent, ſeeing parcel only is demanded, the Plaintiff ought to acknowledge the receipt of the reſidue, as upon an Obligation. And the Caſe being twice moved, the Court did both times agree it to be a Sum in groſs, and no Rent properly, and that the Reſervation

7 H. 6. 26. a. 34. f
4 H. 6. 26. h.
3 H. 4. caſ. prim.
20 E. 4. 2. a.
34 H. 6. 2. a.
2 Roll. 129.

vation ought to be by Déed. 2. That it being a Sum in grosse, no Action would lye till the last day of payment incurred; but yet upon the first motion a Rule was given that the Plaintiff should have his Judgment, supposing that it appeared in the Record that the whole terme was expired: For then they did agrée that an Action would lye for the Rent due at one day; but after upon those two Objections the Judgment was stayed.

Note, This Contract is in the Realty, and the Debt arisetb in respect of the Profits; and therefore it seems an Action will lye before the last day, and so is it ruled in 45 E. 3. 8. b. and admitted 14 H. 7. 2. b. And so Hale told me was his Opinion.

Leech *versus* Davys. Trin. 23. 1870.

Debt. IN Debt upon a Bond of 100 li. Condition that the Defendant should appear in this Court to answer in a Plea of Trespass commenced by the Plaintiff, and to satisfie the Damages he should recover. The Defendant pleaded the Statute of 23 H. 6. and that he was attached and in custody, and that the Bond was made for his Enlargement, and so not his Déed. Whereupon the Plaintiff demurred specially upon the conclusion of the Plea, which ought to be Judgment si action', &c. And therefore the Plea naught, and so agréed. Also it was agréed that the Statute doth not extend to a Bond made to the Plaintiff himself; and so Latch said it was adjudged 30 El. between Raven and Stockden.

Bernard *versus* Bonner.

Eject. Firmæ. IN an Ejectione Firmæ of Lands and 200 Acres of Wood in Stanmore in Com' Middlesex, upon a Lease alledged to be made by the Earl of Rutland and Geo. Sutton Domin' Lexington and others; upon Not Guilty it was moved by Mainard upon the Evidence in a Trial at the Bar, That Sutton was no Peer of the Realm of England, but only an Irish Baron, and so not the same Demisee; and the Case in Dy. 300. a. was cited: But it was answered and resolved by the Court, That for-

forasmuch as the Issue here is not whether G. Sutton Dom' Lexington did demise as it was in Dyer, where his Title is made parcel of the Issue, and therefore a failure, but here it is non cul. So that it is sufficient that it be the same person that did demise, though misnamed. And so it hath been resolved in the Case of a Demise alledged by Sir Ralph Euer, Dom' Euer, who was no Baron: And in another Case of a Demise alledged to be made per J. S. Dom' Sinclere, who was an Irish Baron, upon Not Guilty pleaded, &c.

And the Evidence proceeding, the Case was, That Sir Thomas Lake being seized in Fee of the Premisses, levyed a Fine to the use of Sir Nich. Forteseue for 41 years, if Sir T. L. lived so long, the remainder to his Wife for life, the remainder to Sir Nich. for the life of T. L. with other remainders over; Sir Nich. granted the Land, & totum statum suum, to one Page and Ducke, &c. habendum for 60 years. And after Sir Nich. demiseth the same Lands to the said Page and Ducke, &c. by Indenture for 60 years, if Sir Tho. Lake junior, or his Wife, live so long; Page and Duck by Indenture reciting this last Demise, assign and grant the said Terme, habendum the Land & totum statum suum during the residue of the said Terme of 60 years to Sir Tho. Lake. And the Opinion of the Court was, That by the Grant of Sir Nich. his whole Estate, his remainder passed, and the habendum repugnant, because no other ceremony was requisite, he himself being Tenant for years. Then it was moved that there ought to be an Entry by him, but that was agreed not requisite; for the Statute executes the Estate actually, and such a Lessee may attorn before Entry; and the Case was the stronger, because his terme was not sufficient to satisfie the Grant for 60 years. Then it was doubted what effect the Assignment of Page and Ducke had, because the terme recited was a Lease by Estoppel for the Lessor only, for the Lessor then had nothing in the Land. And it was agreed in this Case, that if Lessee for Life accept of a Lease for years, this is a Surrender of his Estate for Life.

Hodson

Hodson *versus* Sir Anth. Ingram. Hil. 23 Car. *Rot.* 968.

Debt. IN an Action of Debt upon a Bond with condition to perform Articles of an Inventure, which recited, that where certain persons were obliged to the Earl of Holland in eight Obligations, which the Earl had assigned to the Defendant to his own use, now it is agreed that the Defendant should assign the Obligations to the Plaintiff, to the Plaintiffs own use; And the Defendant Covenants that the moneys should be paid at the several days limited by the Bonds, or within eight days after. And the breach was assigned that the sum of 50 li. payable by one of the Bonds was not payd the Plaintiff upon the first of March, which was the day limited by the Bond, and Issue thereupon was found for the Plaintiff; and Hale moved in arrest of Judgment that the Replication was insufficient, for it might be paid within the eight days after; also that the Condition was for Maintenance, and so the Bond void, and Judgment was stayed.

Faldo & Pindar. Hil. 23 Car. *Rot.* 594.

Replevin. IN a Replevin the Defendant avowed for Rent-charge granted by Fine sur concessit for the life of J. S. to the use of Tho. Faldo and his Assigns for the life of the said J. S.. And the limitation of the use being traversed, and Issue thereupon joyned, upon a Trial at the Bar, the evidence was, that it was to the use of him, his Heirs and Assigns, for the life of J. S. And the Court directed that it should be found specially, for because the Freehold is intire, it may be a question whether it was the same Freehold.

Chap-

Chappel *versus* Goodhouse. Hil. 23 Car. *Rot.* 1727.

SLander. You are a Buggering Rogue, go home and bugger another Mare. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words would not bear an Action, because the Plaintiff is not charged with any act done. But the Opinion of the Court was, that the words would bear an Action, because they imply an act done. And Roll said, that where one said, Where is that long lock'd, shaggy-hair'd murdering Rogue? And a stranger asked him, Who do you mean? He said, Greene of Faulcet; the words were judged actionable: so he said, where one said, Bring home the Cushion you stole; the words were adjudged actionable. But the Judgment was stayed for further advice.

Slander.

1 Syd. 373
2 Roll. 377
Palm. 11
1 Roll. 47. pl. 6

Dent *versus* Scott. Trin. 22 Car. *Rot.* 1151.

IN an Action of the Case upon an Indebitatus Assumpsit for Wares, it was found by special Verdict, that the Wares were sold to the Defendants Wife for convenient Apparel, which she wore, and if, &c. And the Opinion of the Court was clear for the Plaintiff; for the Wife may charge the Husband for Necessaries, as Apparel, Diet and Lodging, in case that the Husband doth not provide them for her: But if the Husband allow a stipend to the Wife for these things, and it be paid her, then they held she could not charge him. And Roll said, that this was endeavoured to be proved at the trial, and because it could not, he would have had the Jury found generally for the Plaintiff. And Bacon said, that he and the other Judges have lately certified the Lords in Parliament accordingly; but for a flaw in the Declaration which was in consideravit quod venderet & deliberaret, and no averment of any sale or delivery. Judgment was given against the Plaintiff, because the Declaration was insufficient, and so entered.

Acc'on for Case.

1 Syd. 109 123

Note also that the promise in this Case is laid to be made by the Husband, and the sale and delivery made to him, but then it must be deliberasset, for if it

were in consideration quod venderet & deliberaret to him, then it may be questioned whether a Sale and Delivery to the Wife would make good the averment.

Dunsh *versus* Smith. Hil. 23 Car. *Rot.* 37.

Debt. IN an Action of Debt brought by an Executor for the arrears of a Rent-charge, upon the Statute of 32. H. 8. The Plaintiff declares that the Defendant in the life of the Testator did enter into the Land out of which the Rent was issuing, and occupied it, and took the profits thereof by the space of five years: and demands the arrears of the Rent for that time. And after a Verdict for the Plaintiff, Maynard moved that the Action will not lie for the arrears against the Occupiers, for the Statute gives it against the Tenants of the Land. To which Hale answered, That at the Common Law the Action lay against him that took the profits of the Land, and against the Husband that was seized in right of his Wife. C. 4. f. 49. 2. That this Action is given in lieu of a Distress; and the Beasts of the Occupiers were chargeable to the Distress. 3. That it would be convenient that the Plaintiff should be compelled to inquire out in whom the Estate was of right: But Judgment was stayed, Rem. Roll doubted of the Case; but inclined against the Plaintiff.

Pasc. 24 Car. B. R.

Harvy *versus* Thorne. Pasc. 24 Car. *Rot.* 472.

Case. IN an Action upon the Case against an Executor, the Plaintiff declares, that upon a treaty of a Marriage it was agreed between the Plaintiff and the Testator, that he should pay to the Plaintiff 100 li. and whilst that should be unpaid, he should pay the Plaintiff 10 li. per Annum, which Agreement was made Anno 1618. And the Action was brought for all the arrears by the space of 28 years. The Defendant pleaded the Statute of Limitations, whereupon the Plaintiff demurred. And upon the motion of Hale (who advises the Attorney to

to bring the Action for all the arrears) that it appeared that all could not be barred by the Statute. Judgment was given for the Plaintiff, no Counsel being retained in the Cause for the Defendant.

Loder *versus* Hampshire.

IN Debt upon a single Bill of 50 li. the Defendant after Imparlance pleaded, That after the last continuance the Defendant had paid the Plaintiff 5 li. parcel of the 50 li. and demanded Judgment of the Bill. Whereupon the Plaintiff demurred; and because the Defendant did not alledge that he had an Acquittance which he ought to produce. At the motion of Earle, Judgment was given against the Defendant, that he should answer over, &c. C. 5 E. 4. 139. a. Debt. 2 Salk. 519 1 Bro. 342 157 pl. 65

Dod *versus* Robinson. Trin. 23 Car. *Rot.*

SLander. The Plaintiff declares that the last of March, 13 Car. he was Instituted and Inducted into a Parsonage in Ireland, and executed the Office of a Parson in that Church by the space of four years after; and the Defendant said of him, He was a Drunkard, a Whoremaster, a common Swearer, and a common Lyar, and hath preached false Doctrine, and deserves to be degraded. And after a Verdict for the Plaintiff, it was moved by Hale in arrest of Judgment, 1. That the words in themselves are not actionable, because the Crimes charged impute no Civil or Temporal damage to the Plaintiff for which he may have Action: But the Opinion of the Court was clear for the Plaintiff in that point; for that the matters charged are good cause to have him degraded whereby he should lose his Freehold, which is a temporal damage to him. Then it was objected, That he did not lay that he was Parson when the words were spoken. To which it was answered by the Court, That it should be intended he continued Parson, because he had a Freehold in the Parsonage during his life. But it was further urged, That inasmuch as he hath laid a Slander.

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a special time, during which he exercised the Office of a Parson, it shall not be intended that he continued so longer then himself hath said it: And of this the Court doubted, but inclined for the Plaintiff.

Morefield & Webb. Pasc. 23 Car. *Rot.* 51.

Acc'on for Case.

IN a Writt of Error upon Judgment in the Palace Court at Westminster. In an Action upon the Case upon a Promise, and a Verdict for the Plaintiff, It was moved for Error, that the Habeas Corpora Juratorum was not returned served; but that there was a Panuel of the Names of the Jurors annexed to it, which Case is aided by the Statute of 21 Jac. which aids, when there is not any return upon the Writts of Ven. Fac. Hab. Corpora, et Distring. so as a Panel of the Names of the Jurors be returned and annexed to the said Writs. And two Objections were made;

1. That this Statute extends only to such by Writ; and in this Court it is by Precept, and not by Writ.

2. It appears that this Court was erected by Letters Patents, 6 Car. which was after the Statute.

But it was resolved, 1. That it is within the Intention of the Statute which doth provide amendment in any Action, Suit, Plaint, Bill or Demand: And Roll said, that it is questionable, if this Statute extends to the Grand Sessions in Wales; and Justice Jones was angry that it was made a Question.

But it was agreed that the Statute of Jeofails, which doth provide amendment by Examination of the Clerks, &c. shall not extend to inferiour Courts in these points.

2. It was resolved that this Statute extends to the Courts made after, and so not within the Equity: And after upon good deliberation Judgment was affirmed.

Incipit

Inicpit Term' Trinitat. 24 Car. B. R.

Rolls only ſate Judge this Terme, *Bacon* being ſick.

Beaton *verſus* Forreſt. Hil. 23 Car. *Rot.* 355.

IN an Action of Debt upon a ſingle Bill, the Defendant after Imparlance plead.d payment of part after the latter continuance, & petit quod billa caſſetur, &c. the Plaintiff denied the payment, and the Defendant demurred. And it was reſolved by Roll, that the Plea was inſufficient, although pleaded in Abatement only, for that there ought to be an Acquittance; which is controverted in the 9 to Books, where a difference hath been taken between ſuch a Plea pleaded in Barr, and when pleaded in Abatement. Vide L. 5 E. 4. 1 39. 15 H. 7. 18 E. 3 H. 7. 3. g. 7 E. 4. 15. c. Debt. 2 Salk. 519 anle 63

But Roll ſaid, if he had had an Acquittance he might have pleaded it in Barr or Abatement at his election. Then it was moved by Yard to have Judgment peremptory;

1. For that this Plea is pleaded after Imparlance.

2. For that the Plaintiff hath tendered an Iſſue upon the Defendants Plea, which he hath refuſed.

But it was reſolved that the Plea was not peremptory. For

1. When a Plea concludes in Abatement it is not peremptory; but if a Plea in Abatement be pleaded in Barr, it is peremptory. Dyer 228. a.

2. Though it be plead.d after Imparlance, and Iſſue tendered upon it, yet it is not peremptory upon a Demurrer. 34 H. 6. 8. d. In a Writ of Entry upon a Diſſeiſin made to the Anceſtor, the Tenant pleaded in Abatement that the Demandant himſelf was ſeized; the Demandant denied his Seiſin, and concluded to Iſſue: The Tenant pleaded an Eſtoppel to the Demandant, which upon Demurrer was overruled, and yet not peremptory. Br. tit. Peremptory. But if Iſſue be joyned upon a Plea in Abatement, then it is peremptory. 50 E. 3. 20. J. Katesby et K. ſa feme port aſſiſe, the Tenant pleaded that long time before K. was married to J. C. &c. And that ſhe is ſtill the wife of J. C. and not the wife of the Demandant J. K. and demanded Judgment of the Writ, and Iſſue being joyned thereupon, the Tenant concluding to the Aſſiſe, the Demandants demurred as to the Trial, Hob. 81. c. 1 Leuh. 22 1 Syd. 252

viz. that it ought to be by the Bill. And it was awarded to be tried by the Affize. And the Demandant might have waived his Plea in Abatement, and have pleaded in Bar, the Marriage of K. with J. C. and a Releafe from J. C. but was not compelled, becaufe the Iffue made it peremptory to plead. And in cafe after Iffue joyned the Defendant pleads a Plea in Abatement, this is peremptory as well upon Demurrer, as upon trial by Jurors; becaufe after Iffue joyned, no Refpondeat ouster [illegible]

By. 311. a.

6 Mod. R. 9

Hob. 81. a.

1 Syd. 252

1 Syd. 252

Prag-

Prugnell & Anne Goffe.) Pasc. 24 Car. Rot. 217.

IN a Writ of Error upon a Judgment in the C. B. in an Error.
Action upon the Case, for that the Defendant in consideration of a Marriage to be had between the Plaintiff and her Daughter, promised to give 100 l. to the Plaintiff, and

1 Syd. 464.

1 Lev. 115 pl. 259
3 Keb. 242

1 Lev. 242 pl. 279

Trin.

Trin. 24 Car. B. R.

Freeborne versus Pincras. Hil. 23 Car. Rot. 1375.

Act'on sur Case.

IN an Action upon the Case the Plaintiff declares that the Defendant in consideration of his promise to joyn with him in a Surrender of certain Copyhold Lands for a Sale to [illegible] or any person, and shews that he had procured a [illegible] to be present at a certain place within the Manor, and that the Plaintiff was then and there ready to have joyned with the Defendant in a Surrender of the Lands for a Sale to be made to one J. S. and that the two Copyholders were then and there ready to have received the Surrender, & also that then and there he did require the Defendant to joyn with him in a Surrender into the hands of the two Copyholders to be presented by them in Court, to the use of the said J. S. &c. Secundum consuetudinem manerij pred' à tempore cujus, &c. usitat, quodque sursumredditio sic requisita facienda fuit pro venditione of the said Customary Lands, pro quadam pecuniæ summa per prefat' J. S. solvend', And that the Defendant non junxit with the Plaintiff in the Surrender, licet ad hoc faciend' postea eodem die per pred' querent requisitus fuit, &c.

2 Lutw 1189
1 Brwl. 67

And after a Verdict for the Plaintiff upon Non assumpsit pleaded, upon motion in Arrest of Judgment, it was objected by Roll that the Declaration was insufficient;

1. For that the Plaintiff hath alledged that he was ready to joyn in a Surrender with the Defendant, and that then and there he did require the Defendant to Surrender, but hath not alledged that he did give notice to the Defendant that he was ready to joyn with him; and so it is no more than a bare request to the Defendant to make a Surrender, which is not sufficient, for that the Plaintiff ought to joyn with him, &c.

2. The Surrender was to be for a Sale to be made to J. S. and the Plaintiff hath not any way intimated to the Defendant that the intention of the Surrender was such. And Roll said that the notice ought to be particular of the agreement and sum for which it was to be sold.

3. The Promise is general to joyn in a Surrender, and the Request is to Surrender into the hands of two Customary Tenants, which being a particular way of Surrender grounded

ed upon a particular cuſtome, is not within the intention of a promiſe generally to Surrender, which is to be taken according to the common way of Surrender; and ſo he ſaid it was reſolved Paſc. 9 Car. in this Court, between Sims and the Lady Smith. And ſo if a man be bound to another to make ſuch aſſurance of Lands as the Obligée ſhall deviſe, it is not ſufficient for him to deviſe a Fine, and to take out a Dedimus, &c. upon it, and require his Conuſans in that, for this is but a ſpecial way of taking the Conuſans; and ſo he ſaid it had been ruled: But if there were a Proviſo that he ſhould not go above five miles from his Houſe, then if his Houſe be above five miles from Weſtminſter, he is bound to make his Conuſans upon the Dedimus; and that he ſaid hath been the difference. 3 Cro. 126 218

4. He hath not poſitively alledged that there was a cuſtome in the Mannor to Surrender into the hands of two Copyholders, which he ought to have done, but hath too ſuperficially pleaded; And Judgment was given againſt the Plaintiff.

Trin. 24 Car. B. R.

Read *verſus* Palmer. Paſc. 24 Car. *Rot.* 326.

IN an Action upon the Caſe the Plaintiff declares, that whereas he had brought an Action of Battery againſt the Defendant, and proceeded to a Trial at Guildhall, London, where a Jury was drawn by conſent, and the Plaintiff and Defendant ſubmitted the Cauſe to the award of two of the Jurors, infra unum menſem proxime ſequent' fiend', and that poſtea eodem die in conſiderat' that the Plaintiff did promiſe to the Defendant to perform omnia et ſingula quæ præd' arbitratores ex parte ipſius querent' de et ſuper præmiſſis faciend' et obſervand' ordinarent et adjudicarent. (And here the Plaintiffs Attorney after Iſſue joyned without notice, inſerted infra unum menſem) the Defendant promiſed in the ſame manner, and the ſame Clauſe there inſerted by the Plaintiffs Attorney. And after Verdict upon Non aſſumpſit, pleaded, this amendment after iſſue joyned without notice, Acc'on ſur Caſe.

was moved in arrest of Judgment, wherein the question was, Whether this amendment were in a point material; for it was agreed that if it were not in a material part of the Declaration, then it could not prejudice the Plaintiff. And Twisden urged that it was not in a material part,

1. Because every submission to an Award implies a Promise to perform it; and so the promise laid is no more then was implyed in the submission.

2. The Promise is to perform what the Arbitrators should award, which must be taken with relation to the submission, which was to an award to be made within a month. And in the words infra unum mensem, are but an expression of that which would have been implyed without them. But it was resolved by Roll upon good deliberation, that the amendment was in a material part; For

1. Though a submission to an Award be good Evidence to induce a Jury to find a Promise to perform it, yet in Judgment of Law the Promise is collateral to the submission, and not implyed in it.

2. Though the Promise be collateral to the submission, yet if it had been laid to have been made at the same time with it, then it should have been intended adequate and proportionable to it; but being laid to be made at another time, although it be the same day, it cannot be so intended, because it is not immediately applyed to the submission, but it might have inlarged or abridged the time limited thereby. And he cited a Case between Hodges and Vevasour, 14 Jac. where the Plaintiff declared, that the Defendant such a day became indebted to him for Wares, and in consideration thereof, postea eodem die, promised to pay it: And this was ruled good, not as a promise in Law, but as an actual promise raised upon a consideration continuing; which he cited to shew that a little distance of time (though the same day) alters the intendment of Law, and a new Trial was awarded.

1 Roll. Rep. 413.
1 Roll. Abridg. 12

Trin.

Trin. 24 Car. B. R.

Chace *verſus* Gold. Paſc. 24 Car. *Rot.* 219.

IN an Action of Debt upon a Bond of 200 li. with Condition for the payment of 104 li. at a day certaine, made by the Defendant, and two others jointly and ſeverally. The Defendant upon Oyer and Entry of the Bond and Condition in hæc verba, pleaded, that the Plaintiff did releaſe præd' ſcriptum obligatorium, by the name of an Obligation in 200 li. per ſolutionem of an 100 li. And averred that no other Bond was made by the Defendant, and the two other perſons to the Plaintiff, beſides that Bond, whereupon the Plaintiff demurred; and upon debate Judgment was given by Roll for the Plaintiff; for the Releaſe of a Bond of 200 li. for the payment of an 100 li. doth not diſcharge a Bond for the payment of an 104 li. for though a greater ſum includes a leſſer, as to a tender, yet the Debt and Duty is intire, and therefore cannot be diſcharged by a Releaſe of a leſſer ſum. And though it be ſaid poſitively, that the Plaintiff did Releaſe præd' ſcriptum obligatiorum, yet the words per nomen doth declare the manner how the Releaſe was made, and it appears to the Court now that in truth the Bond was not releaſed; and it was agreed that the Averment in this Caſe was forreign and idle, and could not make good an inſufficient Releaſe. Vide 10 E. 3. 7. In an accompt againſt one as Receiver by anothers hands, the Defendant pleaded a Releaſe by the Plaintiff of all accompts which he might have againſt the Defendant of all manner of Receipts. And the Deed was of all manner of Receipts from the Plaintiff himſelf, and ruled a good Releaſe. And note the reaſon, becauſe a Receipt by anothers hand is a Receipt from the Plaintiff himſelf.

Releaſe.

Lib. 2. 67. Dyer 98. f.

43 E. 3. 31. 8.

Ellis

Ellis *verſus* Box. Hil. 23 Car. *Rot.* 973.

Debt.

IN an Action of Debt upon a Bond of 200 li. with Condition, reciting, that whereas the Plaintiff and one Hawes were bound in another Bond to perform certain Covenants in an Indenture; if the ſaid Hawes ſhould perform the Covenants in that Indenture; and alſo if the Defendant ſhould ſave the Plaintiff harmleſs of that Bond, then the preſent Obligation was to be void. The Defendant upon Oyer of the Condition, pleaded that Hawes had performed the Covenants in the Indenture, and that he had ſaved the Plaintiff harmleſs of that Bond. And upon a general Demurrer, it was reſolved by Roll that the Plea was inſufficient in ſubſtance, both becauſe the Covenants in the Indenture were not ſet forth, and ſome of them might have been in the Negative, &c. And alſo becauſe he hath pleaded, that he ſaved the Plaintiff harmleſs, without ſetting forth how he did it; and ſo Judgment was given for the Plaintiff.

1 Syd. 50

Trin. 24 Car. B. R.

Drue *verſus* Thorne. Paſc. 24 Car. *Rot.* 605.

Acc'on ſur Caſe.

IN an Action upon the Caſe upon two Promiſes, 1. That the Defendant did accompt with the Plaintiff for divers ſums of Money due to the Plaintiff by the Defendant, and upon that accompt was found Indebted to the Plaintiff in ſo much Money, &c. The ſecond was, that the Defendant was indebted to the Plaintiff in ſo much for wares bought by the Defendant. Upon Non aſſumpſit pleaded, the Jury, as to both Promiſes, found that the Wife of the Defendant, being Sole, was Indebted to the Plaintiff for wares. And that after Marriage with the Defendant, he and his Wife did accompt together with the Plaintiff for the Moneys ſo due, and upon that Accompt 9 li. 13 s. 3 d. was found due to the Plaintiff, which the Defendant promiſed to pay, and if for the Plaintiff, &c. And Windham argued for the Plaintiff.

1 Syd 299

1. That

1. That the Debt of the Wife is the Debt of the Husband, and he is to be charged in the Debet and Detinet.

2. That the accompt of the Husband hath made it his proper Debt; but he agreed the Book of 9 H. 6. 11. c. where an Executor accompted with the Receiver of the Testator, that the Action ought to be brought in the Detinet, because he recovers in right of the Testator. And though in this Case the Wife joyns with the Husband in the accompt, it doth not alter the Case; for the accompt is the accompt of the Husband only, for a feme covert cannot be charged upon an accompt, though she may assign Auditors. 10 E. 4. 8. d. Hobart 88. c. 20 H.6.4.c. 1 Syd. 306

3. The Jury have found an express Promise of the Husband, in respect of which he alone may be charged.

Mainard contra. 1. If the Consideration found by the Jury be different from that in the Declaration, then it is not the same Promise the Plaintiff hath declared upon. For the Objections;

1. The Husband is not charged in the Debet and Detinet, because the Husband is Debtor; but because the Husband and Wife are but one person in Law.

2. The Accompt doth not alter the nature of the Debt, but only reduceth it to certainty. See for this 16 E.4.8.d. 10 H.6. 24 g. 11 H.6. 17. h.

3. The Action is brought upon a Promise in Law, and not upon the express Promise of the Husband; but if the Promise had been Collateral, as in consideration of forbearance, &c. and the Declaration pursuant, the Action against the Husband only would have been good.

Lastly, The Verdict without question doth not warrant the second Promise, which is for Wares bought by the Defendant, whereas the Jury finds them to be bought by the Wife of the Defendant, dum sola fuit, and they conclude to both Promises; so that if either of them be not made good by the Verdict, it is against the Plaintiff. And Roll agreed in all things with Mainard, and Judgment was given against the Plaintiff. 1 Syd 299

Trin. 24 Car. B. R.

Oates & Aylett, &c. Trin. 24 Car. *Rot.*

Error.

IN a Writ of Error upon a Judgment in C. B. in Treſpaſs of Aſſault and Battery againſt four perſons; after a Verdict, upon Not Guilty pleaded, it was aſſigned for Error, that one of the Defendants being within age, appeared by Attorney; and the only queſtion was, Whether the Judgment ſhould be reverſed againſt all, or only againſt the Infant. And it was argued that the Judgment ought to ſtand for the reſt, upon this difference, that where a Judgment is erroneous againſt one Defendant, and the ſame Action would not lye againſt the other only, there it ſhould be reverſed againſt all, as in conſpiracy againſt two, &c. which lieth not againſt one only, but where the ſame Action would have been good againſt the other Defendant only, there the Judgment ought to ſtand againſt him. And 5 E. 4. 7. a. cited, that if Judgment in Treſpaſs be given againſt three, the one of which was
2 R. 3. 1. b. dead, the others ſhall not have a Writ of Error upon that Judgment, but only the Executors of the party deceaſed.

But it was reſolved by Roll, that the Judgment ſhould be reverſed againſt all, becauſe it is one and entire; and accordingly divers Preſidents were cited by him, Trin. 14. Car. between Scudamore and Scriven, &c. in Treſpaſs againſt three, one died, hanging the Writ, and Judgment againſt all three was entirely reverſed, againſt the Book of 5 E. 4. which was denied for Law. And 12 Jac.

Judgment in a Formedon de uno croſto et meſſuagio was wholly reverſed, becauſe a Præcipe lyeth not de croſto, & Paſc. 18. Car. between Creetall and Noreſeild in Error upon a Judgment in Canterbury, in an Action of the Caſe upon two Promiſes, where upon a Verdict for the Plaintiff, damages were taxed ſeverally, and becauſe one of the Promiſes was inſufficiently laid, the whole Judgment was reverſed. Vide Hobart
255
Hob. 260 2 Bro. 343 between Miles and Jacob. et 2. In. 236. d. And Trin. 11 Car.
2 Brownl. 36 1 Roll. 24 between Ellenhead and Dearman in Error upon a Judgment
Salk. 24 in the Marſhalſea, in Debt upon a Bill, and likewiſe upon a Contract, The Defendant pleaded Non eſt factum to the one,

and

and Nil debet to the other, and both being found againſt him, the Judgment was Quod capiatur, and becauſe it was not Quod in miſericordia alſo as to the other Iſſue, the whole Judgment was reverſed. And Trin. 7 Jac. B. R. Rot. 568. between Beard and Beard in the very ſame Caſe with the principal Caſe, the entire Judgment was reverſed: But in an Action at Common Law, where damages are given by Statute, there if the Judgment be Erroneous as to the damages, the principal Judgment ſhall ſtand, as in a Writ of Dower; and ſo he ſaid it was adjudged between Tie and Atkins. Vide 22 E. 4. 46. e. et L. 5. 59. a. Simile in a Quare Impedit.

2 Cro 209 b
2 Brand 190 199
Hareſt 155

And the entire Judgment was reverſed in the principal Caſe: Hale for the Plaintiff in Error; Wilde for the Defendant. And Hale cited a Caſe between Holland and Lee, called Damris Caſe, where he in Remainder in Taile in a Writ of Error to avoid a Common Recovery, aſſigned for Error, that the Voucher being an Infant, appeared by Attorney; for which the entire Judgment was reverſed.

2 Roll rep: 95
1 Roll rep 573 304
1 Bran 354 430
Palm 149 Hob 340

Nota, Hoddeſd's Secondary told me the Caſe of Miles and Jacob in Hobart was not Law.

1 Salk: 25
Hareſt 155

Trin. 24 Car. B. R.

Corniſh *verſus* Cawſy. Trin. 23 Car. *Rot.* 1434.

Debt.

IN an Action of Debt againſt an Executrix, the Plaintiff declared upon a Leaſe made to the Teſtator by Indenture dated the 25 of March, Anno. Habendum à die datus for Seven years; And upon Nil debet pleaded, the Jury found that the Plaintiff by Indenture dated the 25 of March, and delivered the ſame day, demiſed the Land to the Teſtator, which was to have and to hold from the day of the date, for the tearm of Seven years from henceforth next and immediately following, &c. And upon this Verdict the Queſtion was, Whether the Leaſe, in point of Computation, was to commence from the making, or from the day of the Date; for if the Seven years commenced from the making, then the Plaintiff had miſtaken the Leaſe; but if they commenced from the day of the Date, then he had declared right, according to the Leaſe. And it was argued, that the Seven years were to commence from the day of

of the Date, and not from the making of the Leaſe, for that the words will bear that conſtruction; for the words from hence forth may refer to the words from the day of the Date, and ſo to the time of the commencement in point of intereſt. And then the words ſhall be taken as if the Leaſe had been to have and to hold from the day of the date from henceforth for Seven years, excluding the day of the Date in the computation, and this was probably the intention of the parties; and not that the Leaſe ſhould commence one day in point of computation, and the next day in intereſt: Alſo there is a Rent reſerved during the tearm payable annually upon the 25 of March, the laſt day of payment whereof would be out of the tearm, if the Seven years commence upon that day. And the Caſe in Dyer 261. was cited, where an Abbot made a Leaſe for 31. years, and after made a new Leaſe in theſe words, Noveritis nos &c. dictis 31. annis finitis et completis dediſſe, & conceſſiſſe præd' præmiſſa (to the ſecond Leſſee) habend' et tenend' à die confectionis præſentium (termin' præd' finit') uſque ad finem termini 31. annorum tunc immediate ſequentium. And it is there reſolved by all the Juſtices of C. B. that the Leaſe doth not commence in point of computation, till it takes effect in Intereſt, viz. till the firſt 31. years ended. And yet there it might have been ſaid, that the words præd' termino finito ſhould be a limitation in point of Poſſeſſion or Intereſt; and the words à die confectionis &c. in point of computation. But there it is ſaid, that the words, à die confectionis, refer to the Demiſe after the 31. years ended, to have à die confectionis. But note in that Caſe the Opinion of the Court of the Kings Bench was againſt that Opinion. And in this Caſe two other points were moved and agreed by Roll;

1. That where part of the Arrears demanded were due in the time of the Teſtator, and part after his deceaſe, the Action in the Detinet was good for the whole, as well as if all had been due after the death of the Teſtator. And that after a Verdict, Quod non detinet, the Land ſhall not be intended of any value, as it is well known in theſe times, in many places Lands have been of no value, and yet the Executor is liable to the Rent as far as he hath Aſſets; and clearly if he hath Aſſets he cannot wave his tearm. 1 Syd. 266

2. That the Action being in the Detinet, and the Defendant pleading Nil debet, it is holpen by a Verdict. And ſo it was adjudged, as he ſaid in this Court, Trin. 10 Car. Rot. 1289. 1 Syd. 266

1289. between Porter and Gervise. And he said, If in an Action upon the Case upon an Assumpsit, the Defendant plead Not Guilty, it is well enough after a Verdict, and as there your Action is placitum trñs super casum, so here it is placitum debiti.

As to the principal point, he did resolve, That the Plaintiff hath mistaken his Lease; for a Lease Habendum, from henceforth, includes the day of the making; and a Lease Habendum, from the day of the date excludes the day of the date. And with this agrees Barwick's Case, which he affirmed to be Law; (but he said, That if such ancient Patents be given in Evidence, the Jury by presumption to make the Patents good, may find that they were made the last instant of the day of their Date, and then they are good in Law: And so hath it been resolved in point of Evidence.) Now the Habendum being à die datus, and for Seven years from henceforth, &c. to make all parts of it stand, it must be construed to commence from henceforth, viz. as to the computation of the Seven years, that they shall begin upon the 25 of March, and from the day of the date, viz. upon the 26 of March in interest and possession. And he resembled it to the Case of More and Musgrave, Hobart 18. which was cited by Hale, who said he had seen the Record of it, and it is entred Mich. 10 Jac. rot. 76. in Scacar. where the Plaintiff in an Ejectione firmæ declared, that J. S. 5 Maij 10. Jac. Demised a House to him Habendum, from the Feast of Annunciation last past, for 21 years extunc proxime sequent. And the Defendant the same 5. of May ejected him, and upon Non cul. the Jury found that the said J. S. the said 5. day of May, by Indenture bearing date the 4. of May, demised the House to the Plaintiff, To have and to hold from the Feast of the Annunciation last past, for and during the tearm of 21 years, next ensuing the date hereof, fully to be compleat and ended. And upon that Verdict the Plaintiff had Judgment, which was affirmed there; also in which case the tearm began from the Feast of the Annunciation in computation of the 21 years, and upon the 5. of May in point of Interest. But Roll agreed that if in the principal Case the Lease had been made To have and to hold from the day of the date from henceforth for Seven years, then the Plaintiff had declared right. And Judgment was given against the Plaintiff: Hale for the Plaintiff, Twisden for the Defendant.

Trin. 24 Car.

Ward & Prin. Pasc. 24 Car. *Rot.* 169.

Error. IN a Writ of Error upon a Judgment in C. B. in an Action upon the Case, wherein the Plaintiff declares, That whereas one John Ward, the Plaintiffs Grandchild, by the consent of the Plaintiff, was put to the Defendant to serve him, being a as his Clerk. And that the Defendant was to find him meat, drink, and lodging, &c. And that the Plaintiff thereupon had given 30 li. to the Defendant, and had agreed to give 30 li. more in consideration that the Plaintiff, at the special Request of the Defendant, would give consent that the said John Ward should depart out of his Service. And that the said John Ward should depart his Service, the Defendant promised to pay to the Plaintiff 15 li. &c. And upon Non assumpsit, a Verdict for the Plaintiff. And it was moved for Error, that there was no Consideration for the Promise, but the giving of the Plaintiffs consent that J. W. should depart; and he might have departed without his consent; but it was disallowed: For the Relation of the Plaintiff to J. W. and the Charges he sustained in placing him with the Defendant, shew that his Interest was so great in him, that in all probability the Plaintiffs consent was an effectual means to cause J. W. to depart from the Defendants Service. And the Case of Grisby and Lother in Hobart was cited, where the Mothers consent that her Daughter should marry the Defendant, was a good consideration of a Promise to the Mother. And the Judgment was affirmed. Hale for the Plaintiff in the Writ of Error.

Surry. PRigg was Indicted that legitime electus fuit decenniarius, Angl' Headborough of the Ville of D. & non præstitit sacramentum suum, before any Justice of Peace to execute the Office, sed voluntarie & obstinate, abstained from it. And it was agreed by Roll, that one may be Indicted for not taking his Oath in such case; but then he ought to be warned to appear before a Justice of Peace, there to take his Oath; and for want of that, and for that it did not appear how he was

5 Mod R. 96 130

was chosen Headborough, the Indictment was quashed. And afterwards upon motion a Writ was granted out of this Court directed to him, commanding him to go before some Justice of Peace to take his Oath, &c.

was Convicted of Perjury by Verdict, for swearing he was Servant to J. S. where in truth he was only Servant to the Servant of J. S. And for this Oath Roll fined him 10 li. though Wilde moved for an Abatement, for that it was not malicious; and said, that one Tiler in like case was fined but 5 li.

Newton & Uxor *versus* Weekes & Uxor. Hil. 23 Car. *Rot.* 1470.

IN an Action of Covenant upon an Indenture made by the Wife Defendant, whilst she was sole, to the Wife of the Plaintiff, whereby she reciting that she was seized in Fee of certain Lands, in consideration of a Marriage to be had between the Plaintiff and her Son, did grant to the Plaintiff a Rent-charge out of those Lands to have after the death of her Son, and Covenanted to pay it, &c. The Defendants pleaded that she had nothing in the Land at the time of the Grant, but that a stranger was seized of it. And upon Demurrer it was adjudged for the Plaintiff, both because the Defendant is estopped by the Deed, and that the Covenant extends to it as an Annuity, absque argumento ad motionem Mri. Prestwood. Covenant. 2 vol. 2: 69

South-

Southcote *versus* Southcote. Hil. 23 Car. *Rot.* 1173.

IN an Action of Debt upon the Statute of 2 Ed. 6. the Plaintiff ſets forth that he was proprietarius decimarum garbarum & fæni, &c. And that the Defendant did ſow certain Land containing ſo many Acres in that Pariſh with grain, and after mowed it, and carried away the Grain, not ſetting out the tenth part. And after a Verdict for the Plaintiff, upon Nil debet pleaded, it was moved in arreſt of Judgment,

1. That the Plaintiff hath entituled himſelf as proprietarius decimarum garbarum, and demands for Tithe of Grain in general, whereas Garbarum is a word of incertain ſignification, and divers ſorts of Grain are not wont to be bundled up as Rape-ſeed, Muſtard-ſeed, and Cummin-ſeed, which us'd to be threſhed out in the Field.

2. He demands for Tythe of Grain in general, which is too incertain, for that that there are ſeveral ſorts of Grain.

But it was reſolved, 1. That Garba in its prime and proper ſignification is intended of Corn: And ſo Roll ſaid it was reſolved, 1. In Baxter's Caſe upon Conſultation with the Civilians, where one upon a Grant of Decimas garbarum, would have had Tithe-hay; but they did agree that the word in its Latitude did comprehend any thing that uſeth to be bundled, as wood, &c. but the ambiguity of the word here is taken away by the Verdict, and is to be intended of Grain that is Garbable.

2. The word Grain is certain enough, for that it is expreſſed to be ſowen upon a certain number of Acres. And here is not a demand of the thing it ſelf, but Damages for it; and all predial Tithes are within the Statute. And this Exception was over-ruled in the great Caſe, Coke Lib. Intra 162. cited 2. In. 650. And Roll ſaid the ſame Exception was taken in Goldſmith's Caſe, Trin. 10 Car. Rot. 893. B. R. but the Roll being ſeen in that Caſe, the Verdict was not entred. And Roll gave order that the Judgment ſhould be entred for the Plaintiff; but after directed it might be reſpited till next Term: But after the Judgment was entred, and a Writ of Error brought in the Exchequer, but I think it was for delay only.

Inci-

Term. Mich. 24 Car. Banco Regis.

Udal *verſus* Udal.

IN a Trover and Converſion of 400 Load of Timber: Upon not guilty pleaded, the Jury found by ſpecial Verdict, that Sir William Udal being ſeized in fee of the Manor of Horton, whereof the Land where the Timber grew was parcel, did Covenant by Indenture to levy a Fine to the uſe of himſelf in Tail, the Remainder to ſuch perſons and for ſuch Eſtates as he ſhould limit by Indenture, and for want of ſuch limitation, the remainder to the Defendant for life, the remainder to his eldeſt Son in Tail, and to his tenth Son, and for want of ſuch Iſſue, the remainder to W. U. for life, the remainder to his eldeſt Son in Tail, &c. and ſo to his tenth Son, the remainder to the right heirs of Sir William, with a Proviſo that upon tender of 5 s. &c. he might revoke thoſe uſes and limit others, and levyed a fine accordingly. And after by another Indenture reciting the uſes of the firſt and the Proviſo in it, made a new limitation to the uſe of himſelf in tail, the remainder to the Defendant for life, with like remainder, ut ſupra, to his Sons, the remainder to W. U. for life, with like remainders to his Sons, the remainder to the Plaintiff in Tail, &c. according to his power and the clauſe in the ſaid Indentures, and dyed without Iſſue, and the Defendant (neither himſelf nor W. U. having any Son) cut down the Timber and —— years after ſold part of it, and the Plaintiff ſeiſed the reſt, which the Defendant did take again from the Plaintiff, and ſold the ſame, and it, &c.

And (the caſe being argued Trin. Paſch. ult. and this Term) it was reſolved by Bacon and Roll. 1. That if there be tenant for life, the remainder for life, and tenant for life cut down Timber trees, he that hath the Inheritance may ſeiſe them, although he cannot have an Action of waſte during the life of him in remainder; For 1. The particular tenant hath not the abſolute property in the Trees, but only a ſpecial Intereſt in them ſo long as they continue annexed to the Land. And therefore a Termer cannot grant away his term excepting the trees, but the exception is void, for that he cannot have a diſtinct intereſt in them but only relative to the land. And ſo it

5 Co. 12 b.

is resolved in Sanders Case Lib. 5. 12. f. (and so Mainard said) it was resolved 10 Car. in Whites case, in the Court of Wards, in case of lesse for life; but where a Lease for years was made without Impeachment of waste, such an exception was adjudged good (as he said) in Sir Alan Piercy's Case, and so Bacon said it was adjudged 9 Car. in Dame Billinglys Case. Then the remainder for life betters not the interest of the tenant for life in the Trees, but only is an impediment for the time to the bringing of an Action of waste; and therefore after the death of him in remainder for life, an Action will lye for waste done in his life time. And so it is adjudged in Pagets Case, Lib. 5. 76. g. and so (Mainard said) it was adjudged, Mich. 14 E. 2. in a Case not Printed, that where he in reversion upon an estate for life granted his reversion for life, and the tenant for life made waste, and then the grantee of the reversion dyed, that an Action of waste would lye against the tenant for life, which proves that the cutting down of the Trees by the Tenant was tortious.

2. It was resolved that the mean remainders in contingency, though of an estate inheritance, alter not the case, for an estate in contingency is no estate till the contingency happen: And therefore it was agreed that the Plaintiff might have had an Action of waste in this Case, had there not been a remainder for life in esse, notwithstanding the mean contingent remainders.

3. It was resolved that a Trover and Conversion in this Case would lye for all the Timber trees though the Plaintiff never seized parcel of them, for by the cutting down of them an absolute property was vested in the Plaintiff, unless they had been cut down for reparations and so imployed in convenient time. And for this Bury and Heards Case was cited by the Court, which commenced in this Court 20 Jac. and depended seven years, where a stranger entred into Lands leased for life and cut down Timber trees and barked them, and the lessor before seisure brought a Trover for the bark and had Judgment to recover, notwithstanding that the cutting down and barking was all at one time; whereupon it was then objected that the distinct property of a chattle was never settled in the lessor, and the book of 13 H. 7. 9. g. cited, that Trespass vi & armis doth not lye against lesse for years who cuts down Timber trees and sells them. Per Curiam.

Which Case was then affirmed for good Law, but there it was agreed, That if lesse for years cuts down Timber trees and

and lets them lye, and after carries them away, ſo that the taking and carrying away be not as one continued act, but that there be ſome time for the diſtinct property of a divided chattle to ſettle in the leſſor, that an Action of Treſpaſs vi & armis would lye in ſuch caſe againſt the leſſee. And that in ſuch caſe felony might be committed of them, but not where they were taken and carried away at the ſame time. Vide 3 In. 109. a. c. 4. 63. f. And it was reſolved in that Caſe of Bury and Heard, that although the leſſee had a ſpecial Intereſt in the trees as for neceſſary reparations, &c. yet the Action would lye for the leſſor, for the Intereſt of the leſſee was determined by the cutting down, unleſs he had cauſe for neceſſary reparations, which had there been, yet might the leſſor have his Action; but if the leſſee in ſuch caſe had brought his Action and recovered, this would have been a good bar againſt the leſſor: but in the principal caſe there was years diſtance between the cutting down and the ſale. And alſo the Defendant by the ſale made himſelf an abſolute wrong doer, for though there had been cauſe for reparation, yet the Trees being cut down and ſold, though other Trees had been bought with the money and imployed in reparations, this would not have excuſed him in an Action of Waſte.

And an exception was taken by Latch to the execution of the power of Sir William upon the limitation of the uſes by the laſt Indenture, for that it was made with relation to the Proviſo. And five ſhillings were not tendered, which was the Condition of the power thereby reſerved, and then Sir William being tenant in Tail, the reverſion to himſelf in fee, by the firſt Indenture, and dying without Iſſue, the Defendant being his heir was ſeiſed in fee; but the exception was clearly diſallowed, both for that he had a double power by the firſt Indenture, the one to limit other uſes to ſuch perſons and for ſuch eſtates as he pleaſed, the other to revoke the uſes limited by the firſt Indenture, and to limit new uſes. And when he limits uſes generally which cannot ſtand by the power reſerved by the Proviſo for lack of tender, the Law will refer the limitation to the power he had to limit other uſes, &c. And Sir Edw. Clears Caſe, Lib. 6. 18. was cited. And ſecondly, for that the ſecond limitation is expreſly made according to his power, which refers to that power which he purſued: And it was touched whether the uſes limited according to that power were revocable by the Proviſo. And Mainard ſaid it might be a queſti-

a queſtion. And Judgment was given for the Plaintiff. Mainard for the Plaintiff and Latch for the Defendant.

Quære in the caſe cited if a leſſor ſhould bring Trover againſt a ſtranger for Trees cut by him, if this ſhould be a bar to an Action of Waſte for the Trees. And if there were cauſe for reparations, what remedy hath the leſſee for his loſs, for it ſhould ſeem that he will be liable to an Action of Waſte for not repairing, although the leſſor recovers for the Trees.

Sir Anthony Aſhly Cooper *verſus* Saint John. Trin. 24 Car. *Rot.* 267.

Trin. 1649. between the ſame Plaintiff and Webb Defendant entred Hill. 24 Car. *Rot.* 426. the ſame declaration was adjudged good upon a demurrer.

IN Treſpaſs the Plaintiff declared quod cum he was ſeiſed of two Cloſes of paſture which were incloſed by him, and whereas there was a Common next adjoyning to them, the Defendant decem perticatas ſepium clauſ' prædictæ paſturæ proſtravit & ſic proſtratas (for ſuch a time) cuſtodivit, per quod, the beaſts depaſturing in the Common, came into the Cloſes and eat the graſs there ad dam' &c. the Defendant pleaded non cul' infra 6 annos. And after a Verdict for the Plaintiff, Mainard moved in arreſt of Judgment, that it ought to have been vi & armis, becauſe the Treſpaſs is laid to be done in his own ſoil; and ſaid, that in falſe impriſonment per quod he was compelled to pay 5 l. in a Caſe about ſeven or eight years ſince, Judgment was arreſted for want of vi & armis: But the exception was diſallowed and Judgment given for the Plaintiff without argument; for the concluſion per quod and the commencement quod cum ſhew it to be an Action of the Caſe, and the cauſa cauſans of the Damages may be laid vi & armis or without it, Lib. 950. f. Vide 13 H. 7. 26. f. which is no Law.

N. B. 93. d.

Quære if in Caſe of falſe impriſonment there be not a difference between a concluſion per quod & quouſq; &c.

Mich.

Mich. 24 Car. Banco Regis.

Kynaſton & Spencer *verſus* Jones. Mich. 23 Car. *Rot.* 589.

IN Debt upon a bond of 2000 l. bearing date 9 Martii 22 Car. with Condition to ſtand to the award of J. S. and J. N. indifferently choſen Arbitrators of all matters and controverſies betwéen the parties, ſo that they made an award of the premiſes before the Feaſt of Eaſter next enſuing; upon nullum fecerunt arbitrium ante feſtum Paſchæ pleaded by the Defendant; the Plaintiffs replied, that before the Feaſt of Eaſter, viz. the 15 day of April following, the Arbitrators did make their award, that the Defendant ſhould pay to the Plaintiffs 1200 l. at four payments; viz. on the 16 of October, and the 16 of April; and that on the fourth of May he ſhould enter into four bonds for the payment, and ſhould then pay to the Plaintiffs 30 l. towards their coſts and charges expended; and that all Actions and controverſies betwéen the Plaintiffs and Defendant ſhould ceaſe and determine, and that they ſhould ſeal and deliver to each other general Releaſes of all controverſies, ſuits, and demands, until the eighth day of March, and time and place appointed for the doing of this. And Aſſigned breach in not paying the 30 l. upon the fourth of May; The Defendant rejoyned that the Arbitrators nullum fecerunt tale arbitrium modo & forma pro ut, & de hoc, &c. whereupon Iſſue was Joyned, and by ſpecial Verdict it was found that the ſixth of Febr. 22 Car. the parties agréed to ſubmit all controverſies betwéen them to Arbitrement, and that 22 Febr. 22. Car. the Plaintiff became bound to the Defendant to ſtand to the award of the Arbitrators according to the condition, ut ſupra, and that 9 Mart. 22. Car. the Defendant became bound, ut ſupra, and that prædict' 15 die Aprilis 23 Car. the Arbitrators made their award, reciting that the Plaintiffs and Defendant became bound the 9 of March in 2000 l. a piece to perform their award; and that the Defendant had received of the Plaintiff 1000 l. an. 1641. which with Intereſt amounts to 1460 l. and upwards, and that the Plaintiff had bén at Charges for the recovery thereof, and thereby awarded, ut ſupra.

Debt upon Award.

6 Mod R: 34

And upon this Verdict two queſtions were made.

1. Whether upon this Iſſue the ſubmiſſion be in queſtion?
2. Admitting it be, whether the award upon the ſubmiſſion found be a good award? Et Term. Paſch. ult. the Caſe was argued by Philips for the Plaintiff, and Latch for the Defendant. And this Term by Hale for the Plaintiff and Mainard for the Defendant. And it was reſolved by Bacon and Roll.

1. That upon this Iſſue the Jury cannot enquire of the ſubmiſſion, for that is admitted by the plea. And therefore the Defendant could not have ſet this matter forth in the rejoynder, thereby to have made good his bar; that the Arbitrators made no award, for the award in it ſelf is a good award. And it would have been a departure in him to have alledged a matter extrinſecal to the award, which ſhould prove it to be void; and for this Lincy and Aſhtons Caſe 12 Car. in this Court was cited by Roll, where in debt upon a bond to perform an award, upon nullum fecerunt arbitrium pleaded, the Plaintiff ſet forth an award that the Defendant ſhould pay 10 l. to the Plaintiff at the houſe of a ſtranger, and aſſigned breach in non-payment; the Defendant rejoyned that he could not come to the ſtrangers houſe without being a Treſpaſſer: and upon demurrer it was adjudged for the Plaintiff; for the award ſet forth by the Plaintiff was good; and the matter alledged by the Defendant in avoidance of it, was a departure from his bar. And therefore he ought to have alledged the whole matter in his bar. And ſo muſt he have done in this Caſe if he would have taken advantage of the ſubmiſſion; and he ſaid, that 14 Car. Judgment was affirmed in the Exchequer, and both points reſolved accordingly.

39 H.6. 6. h. Lib. 5.103.

2. Againſt the award it was objected, that thereby the bond made by the Plaintiff to the Defendant ſhould be releaſed, but the Defendants bond ſhould ſtand; for the award, that Releaſes ſhould be made of all Actions, &c. till the eighth of March, is entire, and cannot be apportioned in reſpect of time, that is, bind as to the time before the firſt bond, and be void as to the time after.

But it was reſolved, that the award in this Caſe was a good award; for the award that all Suits between the parties ſhould ceaſe, is a good award on both ſides and ſufficient ſatisfaction for the money ordered to be paid by the Defendant; and then though the award be void as to the Releaſes, it is not material;

material; and the Case betwæn Vanbore and Trigge, 14 Jac. in this Case was cited, where an award that all Suits betwæn the parties should cease, and that they should make mutual Releases one to the other till the day of the award, was adjudged good as to the first part, and void for the Releases, because thereby the bond of submission should be released; but where the award is, that they shall make general Releases without fixing to any time, this will be good, because it shall be construed to the time of the submission only. 1 Roll Rep. 437 1 Syd. 365

And it was agræd, that the misrecital of the Arbitrators doth not prejudice their award. And it was touched by the Defendants Counsel, that the submission was void, because at several times, but not insisted on; for the Court held it clearly to be good. And an exception was taken to the Verdict, for that they have not found the award to be made before Easter, and the Court cannot take notice ex officio, that the 15 of April was before Easter: But to that it was answered, that the Plaintiff in his replication hath alledged it to be before the Feast of Easter, viz. 15 April. And the Defendant in his rejoynder hath omitted the words ante festum Paschæ, so that the time is not in Issue. And upon this reason Mr. Hales told me the Court rested for that point, for he held that the Court otherwise could not take notice of the time ex officio, though Mr. Weston said, that the opinion of Roll was, that they might if they pleased. And Judgment was given for the Plaintiffs in my absence, through sickness; but their Opinions were declared, ut supra, before.

Note, Trin. 1649. The same Case came again in question, upon an Action brought by the same Plaintiffs against the Defendants Son, who became bound with his Father, and it is entered Pasch. 1649. Rot. 249. And there the Defendant in his bar sets forth the whole matter and the award verbatim (with cujus tenor sequitur in hæc verba) in English. And upon demurrer without argument adjudged for the Plaintiff, because it ought to be set forth in Latin, and so Roll then chief Justice said it had bæn ruled before; and so it is in Case of a bond to perform Covenants in an Indenture, they must be set forth in Latin. And Roll declared the award to be good for the reasons aforesaid, and so he said he and Bacon had delivered their opinions before, and the manner of pleading it by cujus tenor, &c. was naught.

Dame

Dame Bowles *verſus* Broadhead. Hill. 23. Car. *Rot.* 1578.

Debt.

IN an Action of Debt for 200l. upon the Statute of 2 E. 6. for Tithes of land in the Pariſh of Rinſton *alias* Royſton, the Defendant pleaded the Statute of 31 H. 8. And that the Lands were diſcharged in the hands of the Prior of mount Bretton, at the time of the diſſolution, and Iſſue joyned upon the diſcharge: and upon a Trial at bar, the Defendant not making good his Plee, the Court ruled the value to be taken as confeſſed, becauſe the Iſſue is joyned upon a collateral point. And the Defendant took not the value by proteſtation, and ſo the verdict was given for Two hundred pounds, but neither damages nor coſts.

12 Rep. 63.

12 Rep. 63

Amys *verſus* Cowley.

Ejectment.

IN an ejectione firmæ of Lands in Blandford Forum, upon not guilty pleaded between John Rogers and the Lord Rich, who married his Brothers widdow; the Caſe fell out to be thus, The Lands in queſtion were called Nutford farm, and lay in the Tithing of Ruſhton, within the Pariſh of Blanford Forum, but not within the Borough of Blandford Forum. R. being ſeiſed of that Farm, and of other Lands within the Borough, covenanted to levy a fine of both to certain uſes; and the deed of Covenant deſcribed the Lands to be in the Pariſh of Blandford Forum (the Borough and Tithing being both within the Pariſh). And accordingly a fine was levied of Lands in Blandford Forum generally, not naming it a Ville or Pariſh, but the number of Acres was ſufficient to paſs all the Lands within the Borough and Pariſh. And whether an averment might be taken by the deed, that the fine was intended of Lands within the Pariſh (for otherwiſe the fine muſt be taken as of Lands within the Ville only) was a queſtion directed by Bacon and Roll to be found ſpecially, if the Verdict

2 H. 5. 7. h.
1 Sid. 10

Verdict passed upon that point. And in this Case it was a question upon the evidence, whether the receiving of Rent by him that hath a reversion upon an estate for life make a possessio fratris? And the opinion of the Court inclined that it doth not, and the Quære in the Institutes 15 cap. was mentioned by Roll.

Cases at Nisi prius *in* Guild-hall London, *before* Hen' Roll *Justice* de Banco Regis, Term' Trin' 24 Car.

Johnson *versus* Rawle.

Assumpsit.

IN an Action upon a Promise, the Defendant pleaded a submission of all matters in difference to Arbitriment, and an award, &c. the Plaintiff denied the submission modo & forma, and Issue being joyned thereupon, the evidence was of a submission of all matters touching accompts, and allowed good evidence; and because the Plaintiff could not prove that there were other matters in difference, but matters of accompt, he was non-suited. Hale and Mainard being of his Counsel.

Ludlow *versus* Beckwith.

Ejectment.

IN an Ejectione firmæ, upon not guilty, the Case upon evidence was, that A. devised a House to B. for life, with power to make Leases for Twenty one years rendring Ten pound rent per annum, payable at Michael' or Twenty days after; B. made a Lease for Twenty one years rendering Ten pounds rent per annum payable at Michaelmas. And the questions were,

1. Whether the words (at Michaelmas or Ten days after) were to be taken in sensu diviso, and so the distribution to his power of making Leases, or in sensu conjuncto and so the distribution to the payment of the rent?

2. If taken the last way, Whether he had persued his power in effect?

Mainard. That the power was persued. Hale e contra. But Mainard agreed, that if he had reserved the rent payable Ten days after Michaelmas, then he had not persued his power, because

cauſe the reſervation is not ſo beneficial in it ſelf for the heir of the Deviſor, in favor of whom the power was qualified: But the Caſe fell off, and Roll inclined not one way nor other.

Davies *verſus* Dyos.

IT was ruled by Roll, that a Trover would lye for money which was delivered by the Plaintiff himſelf to the Defendant to keep, though not in bags. Both which points, he ſaid, had been doubted and reſolved. Trover.

Sir Richard Sprigwell *verſus* Io. Allen.

IN an Action upon the Caſe for falſly and fraudulently ſelling an Horſe to the Plaintiff, as the proper Horſe of the Defendant, ubi revera it was the Horſe of Sir J. L. becauſe the Plaintiff could not prove that the Defendant knew it not to be his own Horſe (for the Declaration muſt be that he did it fraudulently or knowing it to be not his own Horſe) for the Defendant bought the Horſe in Smithfield, but not legally Tolled. The Plaintiff was non-ſuit. Action ſur Caſe.

IN an Action upon the Caſe for malicious proſecution upon an Indictment; one of the Jurors names in the Declaration was Lanceſter, and in the Record it was Lancaſter; and ruled no variance though of different ſound, but ſhall be intended the ſame Record. Contra Mainard qui fuit pur le Defend. Action ſur Caſe.

Combs

Combs *versus* Cheny.

Hyle 12

Trover.

IN a Trover and Conversion; upon not guilty, the evidence was that the goods were taken and sold by vertue of a Commission of Sewers. And it was ruled,

1. That this matter might be well given in evidence, upon not guilty pleaded, as deteigning of beasts in a Market for toll.

1 Salk: 379
Gouel 25
5 Mod R 115

2. That the Commissioners of Sewers may sell the distrels, which Roll said was a doubt to him and Bacon, in Quinzy and Fawsets Case, quod vide Term. (so the Issue was found for the Defendant.)

3. That the Jury should not tax treble damages; for the Statute is to be intended only when he justifies by virtue of the Commission of Sewers, so that the matter appears upon the Issue.

Debt.

IN Debt upon a bond of Ten pounds, and per dures pleaded, the Case upon evidence was, that the Plaintiff charged the Defendant with felony for stealing a Horse, and procured a warrant from a Justice of Peace, to a Constable, whereby he was taken. And being in custody, upon promise of the Plaintiff to discharge him, sealed the Bond and was thereupon immediately discharged. And it appeared that the Horse was the Defendants own Horse. And Roll directed the Jury that these proceedings being but to cover the deceipt, the Bond was gotten by dures, whereupon the Plaintiff was non-suit.

Kenrig

Kenrig *versus* Eggleston.

IN an Action upon the Case, against a Country Carriet for not delivering a box with goods and money in it; the evidence was, that the Plaintiff delivered the box to the Carriers Porter, whom he appointed to receive goods for him, and told the Porter that there was a Book and Tobacco in the box, and in truth there was an Hundred pounds in it besides. And it was agreed by the Counsel, and given in charge to the Jury, that if a box with money in it be delivered to a Carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it. And so it was ruled in one Barcrofts Case, as Roll said, where a box of Jewels was delivered to a Ferry-man, who knowing not what was in it, and being in a tempest, threw it over-board into the Sea: and Resolved that he should answer for it. Action sur Case.

2. Roll directed, that although the Plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the Carrier all the particulars in the box. But it must come on the Carriers part to make special acceptance. But in respect of the intended cheat to the Carrier he told the jury they might consider him in damages, notwithstanding the Jury gave 97 l. against the Carrier, for the money only (the other things being of no considerable value) abating 3 l. only for carriage, quod durum videbatur circumstantibus.

Alwin *versus* Taylor.

IN Trover and Conversion of divers quarters of Malt; the Case upon the evidence was, That the Defendant having a great quantity of Malt in a Vessel, impowered one Smith a Broker to sell it; and afterwards the Defendant himself sold it to a stranger, and the same day, and before notice of the sale by the Defendant, Smith sold it to the Plaintiff, Trover.

who demanded it of the Defendant, who denyed to deliver it. And the Case was doubtful to Roll, for if the Defendants sale should stand against the sale of Smith before notice of the first sale, then should he be chargeable for his bargain, which he could not perform without any default in him. And on the other side, it were hard that the sale of the owner, who had the absolute property in the goods, should be defeated by a subsequent sale of him that had but a bare authority. But in conclusion he declared his opinion, That the sale of the Defendant should stand good, and the Broker ought in such Case to make his sale conditionally, if the Master hath not sold it before; but he said that neither the Broker nor his Vendor should be liable to any Action for detaining the goods, though demanded, without notice given of the sale by the Master. Et partes concordaverunt.

Duncomb *versus* Tickridge.

IN an Action upon a Quantum meruit, for Dyet, Lodging and Apparel; the evidence was, that the Defendant being an Infant was sent with a Russia Merchant beyond Sea by his Mother, who did agree to pay him so much for Dyet, Washing and Apparel. And the Merchant in Russia committed the care of the Infant to the Plaintiff, and promised to pay him for his Dyet, Lodging and Apparel. And Roll directed the Jury, that if an Infant comes to a stranger and boards with him, there is a contract in Law implied, that he should pay for his board as much as it is worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract. And the Verdict was accordingly found for the Defendant.

UPon evidence it was said by Roll for Law, That if a Lease for years be made, rendring seven pounds rent per annum, and there be three pounds behind, and at the next day

day the Lessor demands Ten pounds rent; this is no good demand, whereby to take advantage of a condition, because he takes it as an entire sum; but he must demand the seven pounds which then becomes due, and if he demands the arrears also, that is good enough.

Smalman *versus* Hutchinson.

THE condition of a bond to save the Obligee harmless, concerning his buying of certain goods at such a price, extends not to the price but the title, as was clearly agreed upon evidence between them. Obligation.

FINIS.

THE TABLE.

A.

Abatement.

IF a Writ abate one day and another Writ is purchased bearing Test the same day, it shall be intended after the abatement of the first. 34

Action on the Case.

For infected Cattle per quod diversa averia *of the Plaintiffs* interierunt, *without naming how many, and good, because not brought for the Beasts themselves or value of them, but for dammages sustained by their death.* 22

Where in an Action on the Case the causa causans *of the dammages may be laid* vi & armis *or without.* 84

Action on the Case for fraudulently selling a horse to the Plaintiff for his own, &c. 91

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Promiſe to pay ſo much as I. S. *was damnified, and good without giving notice how much.* 21

Promiſe *to give the Plaintiff* 2 s. *for every Piece of Cloth he ſhould buy, and averrs he bought* 100 *Pieces, for which he demands* 10 l. *not good without notice given to the Defendant.* 24

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FINIS.